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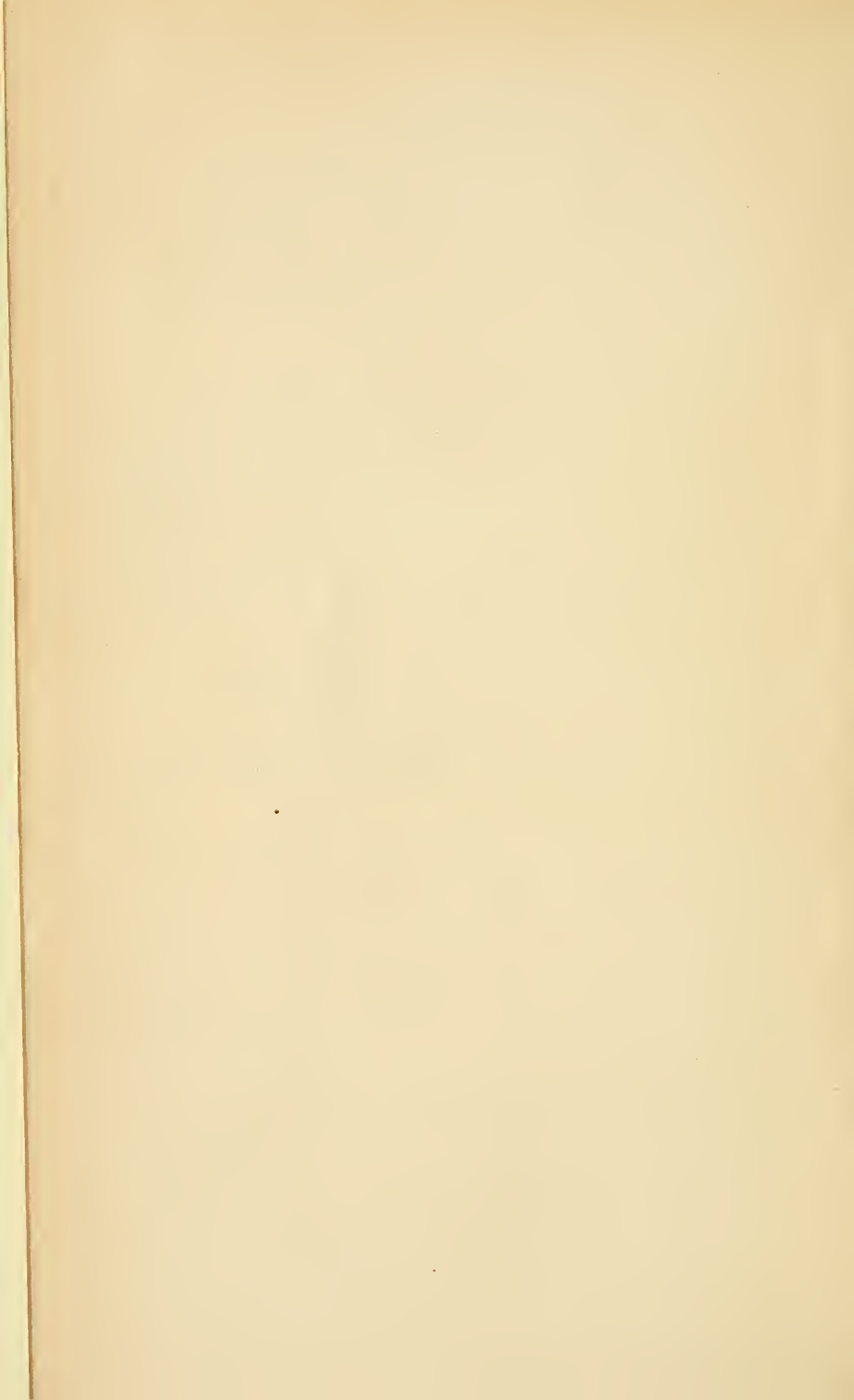
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THE
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OF THE
QUARTER SESSIONS
IN
Judicial Matters

CRIMINAL, CIVIL AND APPELLATE.

BY
THOMAS SIRRELL PRITCHARD,
OF THE INNER TEMPLE, BARRISTER-AT-LAW ;
RECORDER OF WENLOCK.

SECOND EDITION

BY
JOSEPH BRIDGES MATTHEWS
AND
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PREFACE

TO THE SECOND EDITION.



IN preparing the Second Edition of this Work for the press, the plan of arrangement of the First Edition has been followed as closely as possible. It has been found necessary to omit parts of the Work that have become obsolete, while much new matter has been added, including the Table of Appeals Triable at Quarter Sessions and the whole of the Appendices. Many authorities referred to by the Author in the First Edition have been omitted, as being either superfluous or out of date; those that are retained, as well as those new authorities which are added, have all been carefully examined and verified.

In many instances submissions have been made on points of law or practice not covered by authority. For the most part these will be found in foot-notes.

There has been omitted from this Edition the subjects "Particular Felonies Triable at Sessions" and "Particular Misdemeanours Triable at Sessions," which formed the subject-matter

22 2/17 Sept 1860

of Chapters VIII. and IX. of the First Edition, occupying 250 pages; and accordingly, so far as concerns the criminal jurisdiction of Sessions, the present Edition is a book of practice only, and not a treatise upon Criminal Law. A list of crimes triable at Quarter Sessions is given in Appendix A.

In dealing with the Appellate Jurisdiction, it has not been possible to confine the treatment of the subject exclusively to procedure. For instance, in treating of Appeals against the Removal of Paupers, of Bastardy Appeals, and of Appeals against Poor Rates, it has been necessary to refer, more or less fully, to the law on the subject as distinguished from the practice only. No claim, however, is made to have stated the law with such fulness as to enable the practitioner in difficult cases to dispense with well-known text-books devoted to such special subjects.

JOSEPH BRIDGES MATTHEWS.

VICTOR GRAHAM MILWARD.

PREFACE

TO THE FIRST EDITION.



It is not without a sense of his own inefficiency that the Editor of the present Work attempts to supply a want which a practice of many years at Quarter Sessions has led him to believe to exist. The well-known work entitled "Dickinson's Guide to the Quarter Sessions and other Sessions of the Peace," formerly supplied this want, but a period equal to that allotted to a generation of men has passed away since the last edition of that work was published under the editorship of the late Mr. Justice Talfourd. The manifold and extensive statutory amendments and alterations which have been made since that time in all branches of the subject comprised within that work, and the numerous judicial decisions which have added to the previous law, have rendered it useless to the practitioner of the present day. Further, the absence of a fresh edition of the highly esteemed work of Messrs. Leeming and Cross has left a void in the space formerly covered by that treatise. For these reasons, and to supply the wants thus created, the Editor has applied himself to build the present volume on the lines of Mr. Dickinson's work; but he has found it impossible to make clear the distinction between the portion of Mr. Dickinson's work retained and the fresh matter which is interwoven with the old. It has, also, been found impracticable to adopt the plan used in that work, or to cover the ground taken

in by Mr. Dickinson's work, so far as it related to other Sessions than the Quarter Sessions, to which latter jurisdiction this Work is strictly confined.

The comparative rarity of removals of paupers in the present day has been deemed to justify the condensation of the portion of the work relating to that subject into a much smaller space than it would formerly have occupied, whilst, however, the increase in the amount and importance of the cases decided on the rating of property to the poor and other rates has lengthened the part allotted to that matter.

Though every effort has been made to moderate the bulk of the volume, it has nevertheless swollen to the present large size, but the division of the work at the second part is intended to afford a convenient opportunity of dividing the work for the purpose of binding for such as may so desire to do.

In conclusion, the Editor can only express a hope that his labours may be thought to deserve the lenient judgment of the profession.

3, DR. JOHNSON'S BUILDINGS, TEMPLE.

March, 1875.

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19. *For R. v. Bishop of Ely, read R. v. Ely Justices.*
21. *For 45 & 46 Vict. c. 56, s. 189, read c. 50, s. 189.*
45. *For 27 & 28 Vict. c. 99, s. 6, read c. 39, s. 6.*
164. *For R. v. Wallace, read R. v. Willace.*
208. *For Hayman v. R., read Heymann v. R.*
265. *For J. Kelynge, Res. 5 in R. v. Tong, read R. v. Tong (1662), J. Kel. C. C., 3rd ed., p. 21.*
362. *For Reformatory Schools Act, 1893 (47 & 48 Vict. c. 48), read (56 & 57 Vict. c. 48).*
521. *For Barrel's case, read Burrell's case.*
546. *Add R. v. Kent JJ. (1904), W. N. p. 113.*
552. *Add (supporting the view expressed on this page) R. v. Morse and Another (1904), W. N. 114.*
587. *For 43 Vict., read 43 Eliz.*
602. *For R. v. Bell (1816), 7 T. R. 90, read R. v. Bell (1816), 5 M. & S. 221.*
624. *For R. v. Overseers of Bilston, read R. v. Churchwardens of Bilston.*
736. *For But see now sect. 20 of the Licensing Act, 1902, read sect. 10.*
750. *Insert as last paragraph of sect. 2, "On an appeal from their decision, licensing justices have the ordinary right of a litigant to choose his own solicitor, and quarter sessions cannot compel them to employ a particular solicitor: R. v. West Riding Justices, (1904) 1 K. B. 545."*

Quarter Sessions' Practice.

PART I.

OF THE CRIMINAL JURISDICTION AND PROCEDURE.

CHAPTER I.

GENERALLY OF THE SESSIONS OF THE PEACE.

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SECTION 1.

OF THE DIFFERENT KINDS OF SESSIONS OF THE PEACE.

THE term "session of the peace" is used to designate a sitting of justices of the peace for the execution of those powers which are confided to them by their commission, by charter, or by numerous Acts of Parliament. All criminal jurisdictions granted by charter to any borough were, however, made to cease by 5 & 6 Will. 4, c. 76, s. 107. Of these sessions there are four kinds—petit, special, quarter sessions and general sessions. The first of which, in counties, is a meeting of two or more justices of the same district or division for the execution of some power vested in them by law, either had on their own motion or summoned on the requisition of any party entitled to require their attendance, to discharge some duty required to be performed by two or more justices. The county is divided into districts or divisions for petty sessional purposes by the quarter sessions (a). In cities, boroughs or

Sessions of the peace—what.

Petty sessions.

(a) See *post*, Part IV.

towns corporate, having a separate commission of the peace, or any part thereof, by 12 & 13 Vict. c. 18, s. 1, every sitting and acting of justices of the peace, or of a stipendiary magistrate, either in a police court or other place appointed in that behalf, is to be deemed a petty sessions of the peace, and the district for which the same shall be holden shall be deemed a petty sessional division (*b*). The special sessions is a "petty sessions" summoned, after notice, to the justices of the division of the purpose of the meeting, for certain particular defined purposes (*c*)—such as the licensing of ale-houses, appointing overseers of a parish (*d*), or the like (*e*). Quarter sessions and general sessions of the peace is a court of record holden before two or more justices, whereof one is of the quorum, for execution of the authority given them by the commission of the peace and certain statutes (*f*).

Special sessions.

Quarter sessions.

General sessions.

Distinction between general, quarter and special sessions.

According to Lambard, general and quarter sessions are synonymous terms, for he makes no distinction between them. This, however, is erroneous; for it seems that quarter sessions are a species only of the general sessions, and that such sessions only are properly called general quarter sessions which are holden in the four quarters of the year, in pursuance of 2 Hen. 5, and that any other sessions holden at any other time for the general execution of the justices' authority, which by the said statute they are authorized to hold oftener than at the times therein specified if need be, may properly be called general sessions, and those holden on a special occasion for the execution of some particular branch of their authority, may properly be called special sessions (*g*).

By the Interpretation Act, 1889, s. 13, in every Act, whether passed before or after the commencement of that Act, the expression "court of quarter sessions" means the justices of any county, riding, parts, division, or liberty of a county, or of any county of a city, or county of a town, in general or quarter sessions assembled, and shall include the court of the

(*b*) By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (12), the expression "petty sessional court" shall, as respects England or Wales, mean a court of summary jurisdiction consisting of two or more justices when sitting in a petty sessional court-house, and shall include the Lord Mayor of the City of London, and any alderman of that city, and any metropolitan or borough police magistrate or other stipendiary magistrate when sitting in a court-house or place at which he is authorized by law to do alone any act authorized to be done by more than one justice of the peace. "Petty sessional court-house" is defined by sect. 13 (13) of the same Act.

(*c*) 2 Hawk. P. C. 8, s. 18. *R. v. Justices of Worcestershire* (1818), *per* Bayley, J., 2 B. & A. 228.

(*d*) As to present power of parish councils to appoint overseers, see now the Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 5 (1), 30, and 33 (1).

(*e*) See also as to divisions of counties for these purposes, *post*, Part IV.

(*f*) Dalt. c. 185. According to Lambard, 379, it is a meeting of justices for the execution of their general authority, &c.

(*g*) Burn's Justice, 30th ed., tit. *Sessions*, p. 335; 2 Hawk. c. 8, s. 18.

recorder of a municipal borough having a separate court of quarter sessions.

The only description of general sessions which is usually holden in modern times is the court of general quarter sessions; but in the county of Middlesex, besides the four quarter sessions, four general sessions are held in the intervals, and original intermediate sessions also occasionally take place. As the statutes requiring general sessions to be held at particular times are merely directory, there is no ground for the doubt at one time expressed, whether by law justices have power to hold sessions more frequently than once a quarter; for sessions so held are clearly legal; indeed, 2 Hen. 5, st. 1, c. 4, s. 2, after pointing out at what parts of the year the four sessions shall be held, adds, "and more often if need be." But in counties where, from the occasional arrear of business, it is desirable that sessions shall take place more frequently than once a quarter, it is the modern practice to adjourn the last preceding quarter session to some intermediate day before the time for holding the next original quarter session, instead of holding an extra original general session (*h*). It has also been decided that the holding original intermediate sessions without adjournment of the last preceding quarter session, is perfectly legal, upon issuing a new precept to the sheriff, and new summonses to the jurors (*i*).

General sessions, when holden.

The court of quarter sessions being an aggregate meeting of individual justices for the purpose of exercising their powers in quarter sessions assembled, we must look to the powers conferred on the individual justices to ascertain the jurisdiction of the Court.

SECTION 2.

JURISDICTION OF THE GENERAL AND QUARTER SESSIONS IN COUNTIES.

The jurisdiction of the sessions of the peace is determined in the commission of the peace granted by the Crown to the individual justices; and such commission may extend over the whole county or to a portion of a county, as a liberty or franchise, either with concurrent or exclusive powers; but the jurisdiction of justices, under a commission for the county, extends over a liberty or franchise created in the county which has a separate commission, unless their authority is taken away by the express provisions of the charter constituting the liberty, or by Act of Parliament (*k*), as the Bishop of Ely

Jurisdiction of justices.

(*h*) Dick. Q. S., 4th ed. 44, and see note.

(*i*) *R. v. Mullaney* (1833), 6 C. & P. 96.

(*k*) *Arnold v. Gaussen* (1853), 8 Exch. 463; *Arnold v. Dimsdale* (1853), 2 E. & B. 580. See also 5 & 6 Will. 4, c. 76, s. 111, by which the jurisdiction of county justices is recognized in boroughs not having a court of quarter sessions of their own.

and his successors, the Archbishop of York and the Bishop of Durham, under 27 Hen. 8, c. 24, ss. 20, 21, 22.

By statute.

The commission of the peace, under which the magistrates of a county derive their powers, dates from about the year 1327, the earliest statute on the subject to be found on the Parliamentary roll being the 1 Edw. 3, c. 16, from which Act we are to date the final alteration in our constitution, whereby the election of conservators of the peace was taken from the people and transferred to the assignment of the Crown (*l*). Prior to that time, besides the ex officio guardians and conservators of the peace, such as king's justices, inferior judges and ministers of justices, as sheriffs, constables, tythingmen, head-boroughs and the like, there were conservators of the peace by tenure and prescription, and others elected in full county court in pursuance of the writ directed to the sheriff, besides other extraordinary ones appointed by commission from the king (*m*).

By 1 Edw. 3, c. 16, intituled, "Who shall be assigned justices and keepers of the peace," it is enacted that, "for the better keeping and maintenance of the peace, the king will that in every county good men and lawful, which be no maintainers of evil or barrators in the county, shall be assigned to keep the peace." The next year the form of the commission was enlarged, and continued still further to be enlarged both in that king's reign and in succeeding reigns (*n*).

By 4 Edw. 3, c. 2: (3) Also there shall be assigned good and lawful men in every county to keep the peace; (4) and at the time of the assignments mention shall be made that such as shall be indicted or taken by the said keepers of the peace shall not be let to mainprise by the sheriffs nor by none other ministers, if they be not mainpernable by the law; (5) nor that such as shall be indicted shall not be delivered but at the common law; (6) and the justices assigned to deliver the gaols shall have power to deliver the same gaols of those that shall be indicted before the keepers of the peace; (7) and that the said keepers shall send their indictments before the justices, and they shall have power to inquire of sheriffs, gaolers and others, in whose ward such indicted persons shall be, if they make deliverance or let to mainprise any so indicted which be not mainpernable, and to punish the said sheriffs, gaolers and others if they do anything against this Act.

By 18 Edw. 3, st. 2, c. 2: "Two or three of the best of reputation in the counties shall be assigned keepers of the

(*l*) Lamb. bk. 1, c. 4.

(*m*) Lamb. bk. 1, c. 3.

(*n*) Lamb. bk. 1, c. 9; Burn's Justice, 30th ed., tit. *Justices of the Peace*.

peace by the king's commission, and at what time need shall be the same with other wise and learned in the law shall be assigned by the king's commission to hear and determine felonies and trespasses done against the peace in the same counties, and to inflict punishment reasonably according to law and reason and the manner of the deed" (o).

By 34 Edw. 3, c. 1 (A.D. 1360), intituled, "What sort of persons shall be justices of the peace and what authority they shall have," it was directed: (1) "That in every county of England shall be assigned for the keeping of the peace one lord, and with him three or four of the most worthy in the county, with some learned in the law; (2) and they shall have power to restrain the offenders, rioters, and all other barrators, and to pursue, arrest, take and chastise them according to their trespass or offence; (3) and to cause them to be imprisoned and duly punished according to the law and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisement; (4) and also to inform them and to inquire of all those that have been pillors and robbers in the parts beyond the sea, and be now come again and go wandering, and will not labour as they were wont in times past; (5) and to take and arrest all those that they may find by indictment or by suspicion, and to put them in prison; (6) and to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the king and his people, and the other duly to punish to the extent that the people be not by such rioters or rebels troubled nor endamaged, nor the peace blemished, nor merchants nor other passing by the highways of the realm disturbed, nor put in fear by peril which might happen of such offenders; (7) and also to hear and determine at the king's suit all manner of felonies and trespasses done in the same county according to the laws and customs aforesaid; (8) and that writs ofoyer and determiner be granted according to the statutes thereof made, and that the justices which shall be thereto assigned be named by the court and not by the party; (9) and the king will that all general inquiries before this time granted within any seigniories for the mischiefs and oppressions which have been done to the people by such inquiries, shall cease utterly and be repealed; (10) and that fines which are to be made before justices for a trespass done by any person be reasonable and just, having regard to the quantity of the trespass and the causes for which they be made." This statute is said by Lord Holt to have made justices of the peace complete judges (p), and in pursuance of

(o) By 12 Rich. 2, c. 10, the number is increased to six, and by 14 Rich. 2, c. 11, to eight.

(p) *Harcourt v. Fox* (1693), 1 Show. 528.

The commis-
sion of the
peace.

its direction the commission of the peace issues, under which magistrates for counties act in the several sessions, which we shall hereafter consider. The commission almost in its present form was settled by a conference of the judges in Michaelmas Term, 1590 (*q*), and commanded by the then lord chancellor to be used (*r*).

The commission consists of two parts or two different assignments. By the first assignment, any one or more justices have not only all the ancient power touching the peace which the conservators of the peace had at the common law, but also that whole authority which the statutes have since added thereto (*s*). The second assignment defines their powers in sessions.

The form of the commission which was used down to the year 1878 was as follows:—

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To A. B., C. D. (naming all the justices of the county or riding), greeting.

Know ye that we have assigned you jointly and severally, and every one of you, our justices to keep our peace in our county of W.; and to keep and cause to be kept all ordinances and statutes for the good of the peace, and for preservation of the same, and for the quiet rule and government of our people, made in all and singular their articles in our said county (as well within liberties as without), according to the force, form and effect of the same: and to chastise and punish all persons that offend against the form of those ordinances or statutes, or any of them, in the aforesaid county, as it ought to be done according to the form of those ordinances and statutes; and to cause to come before you, or any of you, all those who, to any one or more of our people concerning their bodies, or the firing of their houses, have used threats, to find sufficient security for the peace, or their good behaviour towards us and our people; and if they shall refuse to find such security, then them in our prisons, until they shall find such security, to cause to be safely kept.

We have also assigned you, and every two or more of you (of whom any one of you, the aforesaid A. B., C. D., &c., we will shall be one), our justices, to inquire the truth more fully, by the oath of good and lawful men of the aforesaid county, by whom the truth of the matter shall be the better known, of all and all manner of felonies, poisonings, enchantments, sorceries, arts magic, trespasses, forestallings, regratings, ingrossings and extortions whatsoever; and of all and singular other crimes and offences of which the justices of our peace may or ought lawfully to inquire, by whomsoever, and after what manner soever, in the said county done or perpetrated, or which shall happen to be there done or attempted; and also of all those who in the aforesaid counties, in companies, against our peace, in disturbance of our people, with armed force, have gone or rode, or hereafter shall presume to go or ride; and also of all those who have there lain in wait, or shall hereafter presume to lie in wait, to maim, or cut, or kill our people; and also of all victuallers, and all and singular other persons who, in abuse of weights and measures, or in selling victuals against the form of the ordinances and statutes, or any one of them, therefor made for the common benefit of

(*q*) 32 & 33 Eliz.

(*r*) See 1 Br. & B. 552.

(*s*) Dalt. c. 5, p. 15.

England and our people thereof, have offended or attempted, or hereafter shall presume, in the said county, to offend or attempt; and also of all sheriffs, bailiffs, stewards, constables, keepers of gaols, and other officers who, in the execution of their offices about the premises, or any of them, have unduly behaved themselves, or hereafter shall presume to behave themselves unduly, or have been, or shall happen hereafter to be, careless, remiss or negligent in our aforesaid county; and of all and singular articles and circumstances, and all other things whatsoever that concern the premises or any of them by whomsoever and after what manner soever in our aforesaid county done or perpetrated, or which hereafter shall there happen to be done or attempted in what manner soever; and to inspect all indictments whatsoever so before you or any of you taken, or to be taken, or before others, late our justices of the peace in the aforesaid county, made or taken and not yet determined; and to make and continue processes thereupon against all and singular the persons so indicted, or who before you hereafter shall happen to be indicted, until they can be taken, surrender themselves, or be outlawed; and to hear and determine all and singular the felonies, poisonings, enchantments, sorceries, arts magic, trespasses, forestallings, regratings, ingrossings, extortions, unlawful assemblies, indictments aforesaid, and all and singular other the premises, according to the laws and statutes aforesaid, as in the like case it has been accustomed or ought to be done; and the same offenders, and every of them, for their offences, by fines, ransoms, amerciaments, forfeitures, and other means, as according to the law and custom of England, or form of the ordinances and statutes aforesaid, it has been accustomed or ought to be done, to chastise and punish.

Provided always, that if a case of difficulty upon the determination of any of the premises before you, or any two or more of you, shall happen to arise, then let judgment in nowise be given thereon before you, or any two or more of you, unless in the presence of one of our justices of the one or other Bench or of one of our justices appointed to hold the assizes in the aforesaid county.

And therefore we command you and every of you that, to keeping the peace, ordinances, statutes, and all and singular other the premises, you diligently apply yourselves; and that, at certain days and places which you or any such two or more of you as is aforesaid shall appoint for these purposes, into the premises you make inquiries; and all and singular the premises hear and determine, and perform and fulfil them in the aforesaid form, doing therein what to justice appertains, according to the law and custom of England; saving to us the amerciaments and other things to us therefrom belonging. And we command by the tenor of these presents our sheriff of W., that at certain days and places which you or any such two or more of you as is aforesaid shall make known to him, he cause to come before you or such two or more of you as aforesaid, so many and such good and lawful men of his bailiwick (as well within liberties as without), by whom the truth of the matter in the premises shall be then known and inquired into.

Lastly, we have assigned to you the aforesaid A. B., keeper of the rolls of our peace in our said county; and therefore you shall cause to be brought before you and your said fellows, at the days and places aforesaid, the writs, precepts, processes and indictments aforesaid, that they may be inspected, and by a due course determined as is aforesaid.

In witness, &c.

Under this commission in former times the justices in quarter and general sessions exercised jurisdiction over felonies with no limitations, except that which sprung up in practice of abstaining from the more difficult and important cases; so that offences punishable capitally or with transportation for life were cognizable by them. Indeed, in the 16th and 17th centuries, capital cases were freely dealt with

at sessions. It appears from Mr. Hamilton's History of the Quarter Sessions from Elizabeth to Anne (*t*), compiled from records still preserved at Exeter Castle, that "At the Epiphany sessions for the County of Devon, 1598, there were 65 prisoners, of whom 18 were hanged; at Easter there were 41 prisoners, and twelve of them were executed; at the midsummer sessions there were 35 prisoners and eight hanged; at the October sessions there were 25, of whom only one was hanged." At the Lent assizes of the same year there were 134 prisoners, of whom 17 were sentenced to death, and at the autumn assizes there were 87 prisoners and 18 sentenced to death. "In all 74 persons were sentenced to be hanged in the County of Devon alone in a single year, and of these more than one half were condemned at Quarter Sessions." In later times in practice the committing justices, acting upon the caution contained in the commission, sent the more serious cases to the assizes; but instances still occurred in which felonies punishable as above were tried and the sentences passed at sessions, of which *Bourne v. The King* (*u*) is an example.

It will be observed that the phraseology of this commission was of a very medieval character, and that portions of it were quite inappropriate to modern times. In particular, "enchantments, sorceries, and arts magic" were abolished as offences by 9 Geo. 2, c. 5, and "forestallings, regratings, and ingrossings" were abolished by 7 & 8 Vict. c. 24.

Accordingly, by the Crown Office Act, 1877 (40 & 41 Vict. c. 41), her Majesty was empowered, by Order in Council, to make, and when made from time to time to revoke, add to, or alter rules prescribing the form in which, amongst other documents, commissions of the peace were in future to be worded; and it was enacted (sect. 3) that in the case of commissions of the peace the names of the justices should, so far as might seem to her Majesty convenient, be placed in a schedule, with space for additions to be made of the names of justices to be appointed after the issue of such commission.

The present form of the commission of the peace (*x*) in counties is as follows:—

EDWARD THE SEVENTH, by the grace of God of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, to our Lord Chancellor of that part of our said United Kingdom called Great Britain, the Lord President of our Council, the Lord Keeper of our Privy Seal, and the other members of our most honourable Privy Council now and for the time being, the Keeper of the Rolls of our Peace of our county of now and for the time being, the Lord Chief Justice of England, the Master of the Rolls, the Lords Justices of our Court of Appeal

(*t*) Quoted by Sir James Fitzjames Stephen in his History of the Criminal Law of England, Vol. I., p. 467.

(*u*) In Error (1837), 6 L. J. (N. S.) M. C. 129.

(*x*) See *London Gazette*, March 1st, 1878, p. 1754.

and the Justices of our High Court of Justice now and for the time being, our Attorney and Solicitor-General now and for the time being, and the persons named in the schedule hereunto annexed, greeting.

Know ye that we have assigned you jointly and severally and every one of you our justices to keep our peace in the county of _____ and to keep and cause to be kept all the ordinances and statutes for the good of our peace and for the preservation of the same, and for the quiet rule and government of our people made in all and singular their articles in our said county (as well within liberties as without) according to the force, form, and effect of the same; and to chastise and punish all persons that offend against the form of those ordinances and statutes or any one of them in the aforesaid county, as it ought to be done according to the form of those ordinances and statutes; and to cause to come before you or any one of you, all those who to any one or more of our people concerning their bodies or the firing of their houses have used threats, to find sufficient security for the peace or their good behaviour towards us and our people; and if they shall refuse to find such security, then them in our prisons until they shall find such security to cause to be safely kept.

We have also assigned you and every two or more of you our justices to inquire the truth more fully by the oath of good and lawful men of the aforesaid county, by whom the truth of the matter shall be the better known, of all and all manner of crimes, trespasses, and all and singular other offences of which the justices of our peace may or ought lawfully to inquire, by whomsoever and after what manner soever in the said county done or perpetrated, or which shall happen to be there done or attempted; and to inspect all indictments whatsoever so before you or any of you taken, or to be taken, or before others late our justices of the peace in the aforesaid county made or taken and not yet determined: and to make and continue processes thereupon against all and singular the persons so indicted, or who before you hereafter shall happen to be indicted; and to hear and determine all and singular the crimes, trespasses, and offences aforesaid and all and singular other the premises according to the laws and statutes of our realm, as in the like case it has been accustomed or ought to be done; and the same offenders and every of them, for their offences by fines, ransoms, amerciaments, forfeitures, and other means as according to the law and custom of our realm or form of the ordinances or statutes aforesaid it has been accustomed or ought to be done to chastise and punish. Provided always that if a case of difficulty upon the determination of any of the premises before you or any two or more of you shall happen to arise then let judgment in no wise be given thereon before you or any two or more of you unless in the presence of one of our justices appointed to hold the assizes in the aforesaid county. And therefore we command you and every of you that to keeping the peace, ordinances, statutes and all and singular other the premises, you diligently apply yourselves; and that at certain days and places which you or any such two or more of you (as is aforesaid) shall appoint for these purposes, into the premises you make inquiries, and all and singular the premises hear and determine, and perform and fulfil them in the aforesaid form, doing therein what to justice appertains, according to the law and custom of our realm. And we command by the tenor of these presents our sheriff of the said county of _____ that at certain days and places which you or any such two or more of you (as is aforesaid) shall make known to him he cause to come before you or such two or more of you as is aforesaid, so many and such good and lawful men of his bailiwick (as well within liberties as without) by whom the truth of the matter in the premises shall be the better known and determined. We also command the keeper of the rolls of our peace in our county aforesaid to bring before you at the days and places aforesaid the writs, precepts, processes, and indictments aforesaid that they may be inspected and by a due course determined as is aforesaid. In

witness whereof We have caused these our Letters to be made Patent.
 Witness ourself at Westminster the day of in the year
 of our Reign.

[Here follows the schedule containing the names of the justices (x).]

Form of Borough Commission of the Peace.

EDWARD THE SEVENTH, by the Grace of God of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, Defender of the Faith, to the Mayor of the Borough of now and for the time being, and the persons named in the Schedule hereto, greeting.

Know ye that we have assigned you and every of you jointly and severally our justices to keep our peace in and throughout the said borough of , and to keep and cause to be kept all ordinances and statutes made for the good of our peace and for the conservation of the same, and for the quiet rule and government of our people in all and every the articles thereof in the said borough according to the form and effect of the same; and to chastise and punish all persons that offend against the form of those ordinances or statutes or any one of them in the aforesaid borough as it ought to be done according to the form of those ordinances and statutes; and to cause to come before you or any one of you all those who to any one or more of our people concerning their bodies or the firing of their houses have used threats to find sufficient security for the peace or their good behaviour towards us and our people; and if they shall refuse to find such security, then them in our prisons until they shall find such security to cause to be safely kept; and therefore we command you that you diligently apply yourselves to the keeping our peace, ordinances, statutes, and all and singular other the premises, and perform and fulfil the same in form aforesaid, doing therein what to justice appertains according to the laws and customs of England. In witness whereof we have caused these our Letters to be made Patent. Witness ourself at Westminster the day of in the year of our Reign.

[Here follows the Schedule containing the names of the justices.]

Considerations leading to the limitation of jurisdiction of the quarter and general sessions.

A bench at sessions is never deficient in general information, personal integrity and pure uprightness of purpose; but the jealous and scrutinizing spirit of modern times, seeking to find in persons who preside as justices in intricate cases acquired qualities of a high kind, required more of that legal knowledge and discrimination which presents to a jury the facts of a case from every point of view that its bearings, with respect to the law on it, may make desirable, and which,

(x) If any gentleman is afterwards added to the number, which is done by appointment of the Lord Chancellor, the clerk of the peace sends the commission to London to the proper office, where the name is inserted. The same form of commission as that prescribed for counties is prescribed for use in the liberties of St. Alban, the Cinque Ports, Cawood, Peterborough, Ripon, the Tower of London, Westminster, the Isle of Ely, the town and county of Haverfordwest, and the Isle of Man: the Lord Warden of the Cinque Ports, the Constable of the Tower, and the Governor of the Isle of Man, being respectively substituted for the Keeper of the Rolls.

though compassed sometimes by the ability and experience of individual magistrates, is seldom to be expected from less than the labour of a life devoted to legal pursuits. The chance administration of justice presents incalculable evils, particularly in criminal matters. The admission or rejection of evidence on mistaken grounds leads to painful results, and in the more serious cases to serious hardship, or a monstrous failure of justice. Juries might be called on in cases of the highest importance to execute their important duties, subject to the efforts of able counsel, without that sufficient counterpoise from the bench which, with even-minded, impartial and temperate authority, combined with adequate knowledge and experience, should closely watch over the course of examination, and preserve inviolate the rule of evidence and the rights of the contending parties.

The subject of awarding punishment is also one of the utmost difficulty, requiring the exercise of great temper, discrimination, discretion and experience, and the higher the punishment allotted to the offence the greater is the attention of the public bestowed upon the mode in which it is exercised.

These considerations led to a legislative restriction of the jurisdiction of quarter sessions in criminal cases of the more serious description by the definition which is contained in 5 & 6 Vict. c. 38. By that Act, "Neither the justices of the peace acting in and for any county, riding, division or liberty, nor the recorder of any borough shall at any session of the peace, or at any adjournment thereof, try any person or persons for any treason, murder or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas for life (penal servitude for life being now substituted by 20 & 21 Vict. c. 3, s. 6), or for any of the following offences :

- " 1. Misprision of treason ;
- " 2. Offences against the queen's title, prerogative, person or government, or against either house of parliament ;
- " 3. Offences subject to the penalties of præmunire ;
- " 4. Blasphemy and offences against religion ;
- " 5. Administering or taking unlawful oaths ;
- " 6. Perjury and subornation of perjury ;
- " 7. Making or suborning any other person to make a false oath, affirmation or declaration punishable as perjury, or as a misdemeanor ;
- " 8. Forgery ;
- " 9. Unlawfully and maliciously setting fire to crops of corn, grain or pulse, or to any part of a wood, coppice or plantation of trees, or to any heath, gorse, furze or fern ;
- " 10. Bigamy and offences against the laws relating to marriage ;

- "11. Abduction of women and girls;
- "12. Endeavouring to conceal the birth of a child;
- "13. *Offences against the bankrupt and insolvent laws*;
- "14. Composing, printing or publishing blasphemous, seditious or defamatory libels;
- "15. Bribery;
- "16. Unlawful combinations and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person;
- "17. Stealing or fraudulently taking or injuring or destroying records or documents belonging to any court of law or equity, or relating to any proceeding therein;
- "18. Stealing or fraudulently destroying or concealing wills or testamentary papers, or any document or written instrument being or containing evidence of the title to any real estate or any interest in lands, tenements or hereditaments."

Bankrupt's
offences.

No. 13, relating to offences against the bankrupt and insolvent laws, has been repealed by the 32 & 33 Vict. c. 62, and any offence against that Act (the Debtors Act, 1869) is expressly enacted to be deemed to be within the jurisdiction of such justices and recorders by sect. 20.

Frauds by
bankers, &c.

Then under 24 & 25 Vict. c. 96, s. 87, no misdemeanor against any of the last twelve preceding sections (*y*) of that Act shall be prosecuted or tried at any court of general or quarter sessions of the peace.

Those sections relate to frauds by agents, bankers or factors, and are the offences of agents, bankers or factors in embezzling money or selling securities, &c. intrusted to them under directions in writing, or chattels or valuable security held for safe custody or special purposes.

Of bankers, &c. in selling property entrusted to them for safe custody;

Of persons under powers of attorney in fraudulently selling property;

Of factors in obtaining advances on the property of their principals and by their clerks wilfully assisting the same;

Of trustees in fraudulently disposing of property;

Of directors of any body corporate or public company for fraudulently appropriating property;

Of directors and public officers of any body corporate for keeping fraudulent accounts;

Of directors and public officers of any body corporate for wilfully destroying books;

(*y*) Two of such sections, namely, sects. 75, 76, of the Larceny Act, 1861, are repealed by the Larceny Act, 1901, and sect. 1 of that Act is deemed to be substituted for them.

Of directors and public officers of any body corporate for publishing fraudulent statements.

The jurisdiction of the courts of quarter sessions to try a person for the common law misdemeanor of attempting to commit suicide is not taken away by the statute 24 & 25 Vict. c. 100, for attempting to kill oneself is not attempting to commit murder within the meaning of that statute (z). So the attempt to commit the felony of having carnal connection with a girl under the age of thirteen years is triable at sessions, though the complete offence is not so triable (a).

Arson is not generally triable at quarter sessions, but in certain instances, under the statute 24 & 25 Vict. c. 97, the setting fire to certain buildings, &c. being punishable with penal servitude for a less term than life is so triable.

Burglary is now triable at quarter sessions by the provisions of the Burglary Act, 1896 (59 & 60 Vict. c. 57).

A court of quarter sessions for a borough has jurisdiction to try an indictment against a person for keeping a disorderly house under 25 Geo. 2, c. 36 (b).

The offence of persons to the number of three or more together unlawfully entering or being by night in any land for the purpose of taking or destroying game or rabbits, any of such persons being armed with an offensive weapon, which is an indictable misdemeanor, is not triable at sessions, and this for the reason that the statute which creates the offence (9 Geo. 4, c. 69, s. 9) in terms makes it cognisable only by the justices of gaol delivery.

Not only are courts of quarter session disabled from trying cases thus excepted from their jurisdiction, but they have no jurisdiction to inquire into the commission of such offences or to receive indictments therefor with a view to the persons so indicted being tried at the assizes. Any indictment so taken is a nullity and will be quashed, and no trial can be had upon it, even though it may have been removed into the King's Bench Division by certiorari, and an order made thereon for the trial to take place at the assizes (c). And where no certiorari has been obtained, a writ of error would lie if the sessions tried such an offence and gave judgment upon it; but where an indictment for a misdemeanor is properly found at the sessions and transmitted by them to the assizes, with a certificate of the clerk of the peace of its being so found, and indorsed a true bill by the foreman of the grand jury at the sessions, it should be tried at the assizes without a new bill being preferred (d).

Attempts to commit felonies.

Setting fire to buildings, &c.

Disorderly houses.

Bills found at sessions and transmitted to the assizes.

(z) *R. v. Burgess* (1862), 32 L. J. M. C. 55.

(a) *R. v. Beale* (1865), L. R. 1 C. C. R. 10.

(b) *R. v. Charles* (1861), 31 L. J. M. C. 69.

(c) *Smith's case* (1588), Cro. Eliz. 87 (a case of forgery which, by the terms of the statute then in force (5 Eliz. c. 9), the sessions had no power to try); *R. v. Haynes* (1825), Ry. & Moo. 298 (perjury); *R. v. Atgby* (1839), 8 C. & P. 770 (forgery and dictum of Erskine, J., as to night poaching).

(d) *R. v. Wetherell* (1819), R. & R. 381.

Apart from the above statute 5 & 6 Vict. c. 38, and where that statute does not apply, if an offence be created, and declared a misdemeanor by a statute passed since the institution of the office of a justice of the peace, it may be tried by a court of quarter sessions, unless there is some special direction that it shall be heard and determined by another court (*e*). Thus, where a statute of 47 Geo. 3 declared lighting fires on the coast at particular times to be a misdemeanor, it was held indictable at quarter sessions, though the Act directed that the offender should be committed to the next court of oyer and terminer, great session, or gaol delivery; and in case of indictment found, should forthwith plead and be tried without traverse (*f*); but in that statute it was also provided that the recognizances to be entered into by the prisoner should bind him to appear at the quarter sessions amongst other courts to answer any indictment there found. Had it not been for this last-mentioned provision, the effect of the direction in the Act for trial by a court of gaol delivery would have excluded the jurisdiction of the quarter sessions, for where a statute creates a new offence, and limits it to be tried before justices of oyer and terminer only, the quarter sessions cannot try it; for though justices of the peace are authorized to hear and determine, they are not what the law intends by justices of oyer and terminer; there being a distinct commission so named (*g*).

Solicitations
to commit
crimes.

In a case where a question was raised, whether the quarter sessions had power to try an indictment for soliciting a party to steal from another, Lord Kenyon said (*h*), "I am clearly of opinion that it is indictable at the quarter sessions, as falling in with that class of offences which, being violations of the law of the land, have a tendency, as it has been said, to a breach of the peace, and are therefore cognizable by that jurisdiction."

In the result, it appears that the quarter sessions have power to try all indictable offences, whether offences at common law, or created by statute; with the exception of cases in which their jurisdiction has been expressly taken away by statute, and of cases where the statute creating an offence has impliedly ousted their jurisdiction by naming another tribunal as that before which the offender is to be tried. An attempt has been made to make a list of all crimes and misdemeanors triable at quarter sessions, and this will be found in App. A.

To compose a general or quarter session of the peace, there must be at least two justices. This is expressly required by the terms of their commission. Formerly one of these two must have been "of the quorum" (*i*), that is to say, of the

(*e*) See Com. Dig. tit. *Justices* (G. 4).

(*f*) See *R. v. Cock* (1815), 4 M. & S. 71, decided on 47 Geo. 3, sess. 2, c. 66, s. 34.

(*g*) Com. Dig. tit. *Justices* (G. 2); 2 Hale's P. C. 44.

(*h*) *R. v. Higgins* (1801), 2 East, 5.

(*i*) Lamb. bk. 4, p. 378.

Number of
justices to
form Court.

number whose names were repeated in the clause of the commission formerly in use, "of whom any one of you the aforesaid" A. B., &c., "we will shall be one." In former times this clause imparted a substantial distinction, as only a select number, supposed to possess higher qualifications for the office than their companions, were enumerated in this clause, without the presence of one of whom others could not act in session (*k*). But progressive changes in the state of society gradually made this distinction unnecessary and invidious; and it was narrowed both by statute and by the mode of framing the commission.

As to the
quorum
clause.

Thus by 26 Geo. 2, c. 27, it was enacted, that no act, order, adjudication, warrant, indenture of apprenticeship, or other instrument, then already done or executed, or thereafter to be done or executed, by two or more justices, which doth not express that one or more of them is of the *quorum*, should be impeached, set aside, or vacated for that defect only. By a subsequent statute (*l*), in cities, boroughs, towns corporate, franchises, and liberties, which have only one justice of the *quorum*, all acts, orders, adjudications, warrants, indentures of apprenticeships, or other instruments done or executed by two or more justices, qualified to act therein, were to be valid, although neither of the said justices should be of the *quorum*. And by 4 Geo. 4, c. 27, that Act was extended to cities, boroughs, towns corporate, franchises, liberties, or other local jurisdictions where the number of justices of the peace was limited, and any one, two, or more of such justices only were of the *quorum*. In recent times it came to be the practice to include all the justices in the quorum clause, so that the distinction between justices who were of the quorum and justices who were not of the quorum practically disappeared, and, as will be seen on reference to the form of commission now in use, the commission no longer contains any quorum clause.

Effect of
quorum
clause gradu-
ally abolished
by statute.

Consequently, any two or more of the justices named in the commission of the peace for any county, division, riding, or liberty, possessing the necessary qualification, and having complied with the form required by law, are competent to hold a general quarter session of the peace for the district over which their commission extends.

General quarter sessions of the peace being that species of general sessions which is held under authority of the commission of the peace by two or more justices at some place within the county fixed by their precept once in every quarter of the year, as directed by various statutes, the whole body of the justices constitute the court, which is one court under one commission, and holding its sittings four times a year (*m*).

Nature of the
court of
quarter
sessions in
counties.

(*k*) 1 Bla. Com. 351.

(*l*) 7 Geo. 3, c. 21.

(*m*) *Per* Blackburn, J., in *R. v. Justices of Westmoreland* (1868), L. R. 3 Q. B. 457.

It is frequently said that a court of quarter session is not a continuing court, and this is true when understood of certain matters which, in the absence of any adjournment of the session, are required to be disposed of by the court during some particular session, and which, if not so disposed of, cannot be dealt with afterwards (*ex. gr.*, taxation of costs which cannot be had out of session unless by consent). But, speaking generally, the court of quarter sessions is a continuing court, and this is a principle which has very important consequences. The justices who compose the court have only one commission, and not a new commission from time to time, and they accordingly have power not only to adjourn the sessions, but to adjourn a matter for further consideration from one session to another, and to respite judgment from one session to another, and bind a defendant convicted upon an indictment at one session to come up for judgment at a future session, and pass judgment upon him at such future session, and this without any adjournment of the session itself. Moreover, the adjournment of a matter for further consideration need not be necessarily to the next subsequent session, but may be to a future session (*n*), unless a statute requires the court to hear and determine the matter at the "next session" or "next subsequent session," as under the Alehouse Act (9 Geo. 4, c. 61), in which case, however, though they cannot adjourn the case to a subsequent original session, they may adjourn the same session to a subsequent day (*o*).

In *Keen v. R.* (*p*), in error from the quarter sessions of Essex, it appeared from the record that the plaintiff in error had pleaded guilty to three indictments for assaults at the general Epiphany quarter sessions at Chelmsford, and that the court had thereupon ordered the plaintiff to enter into recognizances to appear and receive the judgment of the court at the next general quarter sessions if called upon, and to keep the peace for twelve calendar months. These recognizances were duly entered into, and the record further stated that at the Easter quarter sessions of the same year, the justices "not being yet advised what judgment to give," judgment was further respited until the next general quarter sessions. At the midsummer quarter sessions the court passed sentence upon the plaintiff of fine and imprisonment. It was assigned for error that the court had pronounced two separate and distinct judgments, having already at the Epiphany quarter sessions ordered the plaintiff in error to enter into recognizances to keep the peace for twelve months,

(*n*) *R. v. Justices of Westmoreland* (1868), L. R. 3 Q. B. 457.

(*o*) *Ravensley v. Hutchinson* (1871), L. R. 6 Q. B. 305.

(*p*) (1847), 16 L. J. M. C. 180.

and also that the court had no authority to respite a judgment from one session to another.

The Court of Queen's Bench held that the order made at the Epiphany sessions was not a judgment upon the indictment, and did not therefore make the judgment at the midsummer session erroneous, and, upon the assignment of error which more immediately concerns us, that the court had power to respite the judgment from one session to another without adjourning the session.

Denman, C. J., said :—

It appears to me that the whole argument for the plaintiff in error is founded on a fallacy. It is assumed that a subsequent session is a different court from a former session; but it is clearly the same court. The whole body of justices constitute the court. Such a court . . . possesses, as incident to its jurisdiction, the power of adjournment; and surely no better reason can be given for an adjournment than that the justices have not made up their minds as to the judgment to be given.

Patteson, J., said :—

Stat. 1 Edw. 6, c. 7, s. 5, which gives power to judges under a new commission to pass judgment against a person found guilty at a former assize, might have been necessary, because the subsequent assize is held under a new commission. But the sessions have only one commission. So it is quite correct for the justices to adjourn a case from one session to another, because they are not advised what judgment to give.

Coleridge, J., said :—

If the authority is considered under which the sessions are held, I think it will plainly appear they are a continuing court. First of all the commission directs the justices at sessions to *continue process*, but does not prescribe any stated period for holding sessions. Then stat. 36 Edw. 3, c. 12 (q), directs that sessions shall be held four times a year; stat. 12 Rich. 2, c. 10, that sessions shall be held once a quarter; and stat. 2 Hen. 5, c. 4, s. 2, directs in what weeks the quarter sessions shall be held. Still, the authority under which sessions are held is precisely the same with that under which they were held before stated periods were assigned for holding them: and the justices are the same body, in point of constitution, as before. The practice of this court, in issuing writs of mandamus to the sessions to enter continuances and hear an appeal illustrates the point. Our writ does not give the authority to the sessions to continue process, but merely directs them to exercise the authority which they already possess, and to do that which they ought to have done, in furtherance of the ends of justice. We issue our writ to them for this purpose, after they have completely disposed of a case. This we could not do if each session were a distinct court. We deal with the justices as one court, sitting from session to session.

Erle, J., said :—

I think the sessions are a continuing court, and that they have power to adjourn a case from one session to another. And it is most important that they should have such power.

(q) Before this statute the statute 25 Edw. 3, stat. 2, c. 7, had enacted to the like effect.

It will be observed that the express words of the old commission of the peace empowering justices to "continue processes," which Coleridge, J., referred to in *Keen v. R.*, are preserved in the present commission (*r*).

The power of a court of error in a proper case to direct the award of a *venire de novo* upon a proceeding in error upon the record of a trial at quarter sessions is, moreover, derived from the quarter sessions being a continuing court (*s*).

In *R. v. Baines* (*t*), Baines was convicted before the justices of the peace at their quarter sessions upon certain articles of misdemeanors in his office of clerk of the peace (pursuant to the authority given to the justices by 1 W. & M. c. 21) exhibited against him. Upon certiorari it was objected that the words of the statute were "that the justices of peace may at their sessions receive articles against him *which said justices* may, if they see occasion, convict him," and in that case it appeared that the articles were received by such and such, eleven in all, by their names, at such a sessions, and the matter adjourned to another sessions; and there, before six of the aforesaid eleven justices, and others, he was convicted; so the words of the statute were not pursued. But the report continues:—" *Sed non allocatur*: For the meaning of the statute is not that the same individual persons who received the complaint should amove; but it is enough that they are virtually the same, viz., *the same court*; and though not one of those who received it were at the next sessions held by adjournment, it would be notwithstanding well."

Not an inferior court.

It is a court of oyer and terminer, though not usually so called, and not an inferior court in the sense of that term, where it is said that a writ of *venire de novo* can not go to an inferior court (*u*). And it was called a court of oyer and terminer and court of record as distinguished from an inferior court in *R. v. Smith* (*x*), where it was held not to be sufficient to prove the finding of an indictment by the grand jury by the minute book of the clerk of the peace. It is a continuing court also for other purposes than that a *venire de novo* can be awarded to it, for it may order the estreat of recognizances forfeited at a prior sessions; as where a recognizance was entered into under the 9 Geo. 4, c. 61, to try an appeal and pay such costs as the court might award, and the court at which the appeal was tried ordered the appellant to pay a certain amount for costs forthwith, it was held under 3 Geo. 4, c. 46, that there was no forfeiture of the recognizances till the

(*r*) See also as to the court being a continuing court. *R. v. JJ. of Westmoreland* (1868), L. R. 3 Q. B. 457; *Campbell v. R.* (1846), 11 Q. B. 841.

(*s*) *Campbell v. R.*, *ubi sup.*

(*t*) (1704), 6 Mod. 192.

(*u*) *Campbell v. R.*, *ubi sup.*

(*x*) (1828), 8 B. & C. 343.

sessions were over and default made in payment, and that the next sessions had power to order the estreat (*y*).

The commission of the peace is not, like the commission of oyer and terminer, superseded by the issuing of a subsequent commission of oyer and terminer for the same county, so that the commission issued to the judges of assize does not supersede the commission of the justices upon the opening of such commission in the county; and therefore there is nothing in law to prevent the exercise of the jurisdiction of the quarter sessions in the trial of prisoners, notwithstanding the operation of the commission of the judges of assize at the same time in the county (*z*).

Not superseded by the commission of the justices of assize.

It would, however, be inconvenient and undesirable in practice that the quarter sessions should be held for the trial of prisoners, or, indeed, for any other purpose, at such times; and it has long, if not always, been the practice not to hold the quarter sessions in counties during the presence in the county of the judges of assize. The repealed statute, 4 & 5 Will. 4, c. 47, and the present Quarter Sessions Act, 1894 (57 Vict. c. 6), whereby the justices are authorised to alter the time for holding the quarter sessions, in order to prevent them from "interfering with the assizes," seem to afford distinct statutory recognition of the propriety of the general practice. The Court of Queen's Bench in *Smith v. The Queen* (*a*), whilst upholding a conviction for felony which had taken place at the borough quarter sessions for Manchester during the subsistence of the commission of oyer and terminer, expressed the opinion that it would be "highly inconvenient and improper, generally speaking, for the magistrates of a county to hold their sessions concurrently with the assizes, even in a different part of the county"; and concluded: "Of course we cannot anticipate that they should hold them concurrently at the same place."

As was acknowledged by the Court of Queen's Bench in the last-mentioned case, "There may be, in this respect, an obvious distinction between a recorder and the magistrates of a county," and it would appear, from the case in question, that the practice of recorders not to hold their borough quarter sessions at the same time as the assizes has not been without exception. But it is believed that most, if not all, recorders now follow the general practice. Inasmuch as borough quarter sessions are not obliged to be held at fixed periods like county quarter sessions, there has been no occasion for the passing of any Act of Parliament to enable recorders to fix a time for holding their courts which shall not "interfere with" the assizes; accordingly the Quarter Ses-

(*y*) *R. v. Bishop of Ely* (1855), 5 E. & B. 489.

(*z*) *Smith v. R.* (1849), 18 L. J. M. C. 207.

(*a*) *Ubi sup.*

sions Act, 1894 (57 Vict. c. 6), like its precursor 4 & 5 Will. 4, c. 47, relates to county quarter sessions only.

The sitting of the Court of King's Bench in any county superseded the operation of the inferior commission of the peace upon the principle "*In præsentia majoris cessat potestas minoris*," as is laid down in *Lord Sanchar's case*, 9 Rep. 117, and the distinction was between a sitting of the Court of King's Bench, which was the court of error from quarter sessions, and the sitting of the judges under commissions of oyer and terminer who had no appellate jurisdiction by virtue of such commissions. It is submitted that sects. 16 and 29 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), whereby there is transferred to the High Court the jurisdiction of the courts created by commissions of assize, of oyer and terminer, and of gaol delivery (sect. 16), and whereby any commissioner of assize, of oyer and terminer, and of gaol delivery, when engaged in executing any such commission, is deemed to constitute a Court of the High Court of Justice (sect. 24), have not made any alteration in the law as to the effect of the commission of oyer and terminer upon the commission of the peace for the county within which it is being executed.

Jurisdiction
of the jus-
tices in
boroughs.

Commissions may be and are granted to justices to act for boroughs and counties of cities and towns. To exclude the jurisdiction of the county justices from places within a charter, or in places to which the Municipal Corporation Act does not extend, there must be a non-intromittant clause, which must be expressed in clear and ample terms (*b*).

By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 154, (1) where a borough has not a separate court of quarter sessions, the justices of the county in which the borough is situate shall exercise the jurisdiction of justices in and for the borough as fully as they can or ought in and for the county.

(2) No part of a borough having a separate court of quarter sessions shall be within the jurisdiction, exerciseable out of quarter sessions, of the justices of a county, where the borough was exempt therefrom before the passing of the Municipal Corporations Act, 1835.

By sect. 162, (1) it shall be lawful for the Queen on the petition to her Majesty in Council of the council of a borough to grant that a separate court of quarter sessions be holden in and for the borough.

By s. 165, (1) the recorder shall hold, once in every quarter of a year, or oftener, if and as he thinks fit, or the secretary

(*b*) *Blankley v. Winstanley* (1789), 3 T. R. 279; *R. v. Sainsbury* (1791), 4 T. R. 451; *Bates v. Winstanley* (1815), 4 M. & S. 429; *Weatherhead v. Drevry* (1809), 11 East, 168; *R. v. Mayor of East Looe* (1862), 31 L. J. M. C. 245; *Mercer v. Davis* (1830), 10 B. & C. 617; *R. v. Shepherd* (1834), 2 A. & E. 298; *Were v. Clerk of the Peace of Devon* (1865), 34 L. J. M. C. 47; *R. v. Hayward* (1837), 6 A. & E. 590; *R. v. Clarke* (1822), 5 B. & A. 665.

of state directs, a court of quarter sessions in and for the borough.

(2) He shall act as sole judge of the court.

(3) The court shall be a court of record, and shall have cognizance of all crimes, offences, and matters cognizable by courts of quarter sessions for counties in England, and the recorder shall, notwithstanding his being sole judge, have power to do all things necessary for exercising that jurisdiction as fully as those courts. Jurisdiction of the recorder.

(4) But the recorder shall not by virtue of his office, have power

(a) to allow, apportion, make, or levy any borough rate, or,

(b) subject to the provisions of this Act respecting appeals from a rate, to do any act in relation to the allowance, apportionment, making or levying of any rate whatsoever; or,

(c) to grant any licence or authority to any person to keep an inn, alehouse, or victualling house to sell excisable liquors by retail.

By sect. 166, the recorder has power to appoint a deputy.

By sect. 167, in the absence of the recorder or deputy-recorder the mayor shall open the court and adjourn the same, and respite all recognizances.

By sect. 168, the recorder may form a second court.

Where the grant of a court of quarter sessions for a borough having a population of less than 10,000 is revoked under sect. 38 of the Local Government Act, 1888, the jurisdiction of the county justices as to such borough revives (*c*), and where under any Act a place has ceased or ceases to be part of a borough or the liberties thereof, all matters by virtue of a local Act of Parliament or otherwise cognisable by a justice or by the quarter sessions having jurisdiction within that place, become cognisable by the justices or quarter sessions of the county, &c. within which the place is situate (*d*).

It would seem that the grant of a quarter sessions to a borough dates properly from the time that the grant passes the great seal, and not from the date of a notice from the Home Office to the town clerk, that a grant would be made (*e*).

If a grant of quarter sessions be alleged to have been improperly made to a borough, the proper mode of raising the objection is by *scire facias* to repeal the grant, and until such proceeding the grant must for collateral purposes be taken to be valid (*f*).

As the court of quarter sessions in counties is a continuing

(*c*) 51 & 52 Vict. c. 41, s. 38 (*7*).

(*d*) 45 & 46 Vict. c. 56, s. 189.

(*e*) See *R. v. Grimshaw* (1847), 16 L. J. Q. B. 385.

(*f*) *R. v. Boucher* (1842), 3 Q. B. 641.

court, so *à fortiori* is a recorder's court, where there is no succession of commissioners changing from sitting to sitting, but the recorder alone presides continuously at sitting after sitting (*g*).

Jurisdiction
of borough
quarter ses-
sions.

Appeals against poor rates, overseers' accounts, and rates in nature of county rate in boroughs, within a borough of a city or town corporate, not being a county of itself, stand on a peculiar footing; for in corporations or franchises not being counties of themselves, and not having six justices of peace, nor having jurisdiction over two or more whole parishes or wards contained in such corporation, &c., any person might appeal, in a case mentioned or referred to by 43 Eliz. c. 2, or 17 Geo. 2, c. 38, to the next general or quarter sessions of the peace for the county, riding or division wherein such corporation or franchise is situate (*h*). And the exception of corporations, &c. which are counties of themselves, seems not to apply to corporations, &c. which have not four justices at the least. The enactments on this subject were intended to secure a hearing of the merits by justices not concerned in making the rate; and though the justices of a borough have no longer any criminal jurisdiction at courts of gaol delivery, general or quarter sessions, and the recorder is the sole judge, yet as the liberty to appeal to the sessions of the county is not taken away by express words, it appears to remain in these cases, concurrently with the authority of the recorder.

Orders of
removal.

Appeals against orders of removal made by justices of the county are heard at the sessions for the county, division or riding wherein the parish or place from whence the removal takes place shall lie, and not elsewhere, by 8 & 9 Will. 3, c. 30, s. 6; and in boroughs having a court of quarter sessions under 45 & 46 Vict. c. 50, appeals against orders of removal made by borough justices lie to the recorder and the borough court of quarter sessions exclusively (*i*).

By 30 & 31 Vict. c. 106, s. 27, "where a union extends into several jurisdictions, every matter, act, charge or complaint by which the guardians thereof are affected, or in which they have any interest, shall, for the purpose of jurisdiction, be deemed to arise or exist equally throughout the union."

Thus, where a union includes parishes in the county, as well as of a borough having a court of quarter sessions, an order of removal from a parish in the county may be obtained from the justices of the borough, and the appeal from an

(*g*) *Campbell v. R.* (1846), 17 L. J. M. C. 89.

(*h*) See 17 Geo. 2, c. 38, s. 5; 1 Geo. 4, c. 36.

(*i*) *R. v. St. Edmunds, Salisbury* (1841), 2 Q. B. 72; *R. v. JJ. of Shropshire* (1841), *ibid.* 85; *R. v. Recorder of Liverpool* (1850), 15 Q. B. 1070.

order so obtained lies to the court of quarter sessions for the borough, by virtue of that section (k).

(k) *R. v. The Justices of Staffordshire* (1872), L. R. 7 Q. B. 288.

There are some special enactments relating to the Cinque Ports which may be referred to here.

The Cinque Ports were originally Sandwich, Dover, Hythe, Romney, and Hastings, to which the "two ancient towns" of Winchelsea and Rye have since been added. Hastings, Sandwich, Dover, Hythe and Rye had courts of quarter session before the Municipal Corporations Act, 1835. See that Act (6 & 7 Will. 4, c. 105), and see the Cinque Ports Act, 1855 (18 & 19 Vict. c. 48), and the Cinque Ports Act, 1869 (32 & 33 Vict. c. 53).

The Municipal Corporations Act, 1882, s. 248, contains the following provisions with reference to the boroughs of Hastings, Sandwich, Dover, Hythe and Rye:—

Sect. 248 provides that—(1) The boroughs of Hastings, Sandwich, Dover, Hythe, being four of the Cinque Ports, and the borough of Rye, are in this section referred to as the five boroughs.

(2) The jurisdiction, powers, and authorities of the court of quarter sessions, recorder, coroner, and clerk of the peace for each of the five boroughs, shall extend to the non-corporate members and liberties thereof, and to such corporate members thereof as have not a separate court of quarter sessions.

(3) The jurisdiction, powers, and authorities of the persons constituted justices within and throughout the liberties of the Cinque Ports by virtue of their commission shall extend to all places being within the limits of the five boroughs, or of their members or liberties, corporate or non-corporate, and not being within the limits of a borough having a separate commission of the peace.

(4) The justices for the five boroughs respectively shall have all the jurisdiction, powers, and authorities of justices for a county relating to the granting of licences or authorities to persons to keep inns, ale-houses, or victualling houses, or to sell exciseable liquors by retail within any of the corporate or non-corporate members or liberties of the five boroughs respectively, not being within the limits of a borough having a separate commission of the peace.

(5) The non-corporate members and liberties of the five boroughs and such corporate members thereof as have not a separate court of quarter sessions shall be charged by the respective courts of quarter sessions of the five boroughs, with a due proportion of all those expenses of the five boroughs, to the payment whereof rates in the nature of county rates are applicable: and such rates may be assessed and levied in the manner in which rates of that description were assessed and levied before the passing of the Municipal Corporations Act, 1835, under any enactment then in force, but subject to the operation of any subsequent enactment affecting the same.

(6) A due proportion of inhabitant householders to serve as grand jurors and jurors at the respective courts of quarter sessions of the five boroughs shall be summoned by the clerks of the peace thereof from the non-corporate members and liberties thereof, and such corporate members thereof as have not a separate court of quarter sessions; and the attendance of such jurors shall be enforced, and their defaults punished, in the manner by this Act directed with respect to jurors in boroughs.

(7) Nothing in this Act shall affect the Cinque Ports Act, 1869, or the Acts therein recited.

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 48 (4): "The Cinque Ports and two ancient towns and their members shall, for all purposes of the county council and of the powers and duties of quarter sessions and justices out of sessions under this Act, form part of the

SECTION 3.

GENERAL AND QUARTER SESSIONS, HOW AND BY WHOM CONVENED—(1) IN COUNTIES, (2) IN BOROUGHES.

Quarter sessions—how called together in counties.

A general or quarter session may be called by any two justices within the jurisdiction, one being of the quorum, or by the *custos rotulorum* and one justice; but not by one justice or by the *custos rotulorum* alone (*l*). The presence of two justices is necessary to its being held (*m*), or even adjourned so as to hold it legally (*n*) at another time.

By precept.

The clause in the commission, that the sheriff shall cause a jury to appear at such days and places as the said justices, or any two or more of them, shall make known to him, confers the authority on two justices to convene a general session. This is done by issuing a precept under their hands and seals, addressed to the sheriff, requiring him to summon the proposed session of the peace for general purposes, at some day not less than fifteen days from the date of the precept (*o*), to return a grand and petit jury, and give notice throughout his bailiwick to jurors, coroners, gaolers, stewards, constables and bailiffs of liberties, whose attendance is requisite (*p*). The precept to the sheriff is necessary in order that he may summon all the persons who are bound to attend as constituent parts of a court of criminal jurisdiction, called together by the same instrument. This difference in the object of a general sessions, as distinguished from a special sessions, accounts also for the difference of the mode in which the two courts are assembled. The issue of such a precept to the sheriff is absolutely requisite to compel any person whatever to attend a general session, or to expose them to the penalty of absence. But it is not absolutely necessary to the making of a lawful session that a regular precept should be issued ;

county in which they are respectively situate, without prejudice nevertheless to the position of any such port, town or member, as a quarter sessions borough, under the Municipal Corporations Act, 1832, as amended by this Act, and without prejudice to the existing privileges of such ports, towns and members as respects matters which are not affected by this Act. There are also special enactments referring to the liberty of St. Alban (37 & 38 Vict. c. 45) ; the liberties of Ripon, Cawood, Wistow, and Otley, and the Isle of Ely (6 & 7 Will. 4, c. 87) ; and the Duchy of Lancaster (34 & 35 Vict. c. 73).

(*l*) Lambard, 375.

(*m*) 1 Bla. Com. 354, n. ; 5 Burn's Justice, 342, 30th ed.

(*n*) *R. v. Westrington* (1750), 2 Bott, 733. See 2 Stra. 1264, *R. v. Polstead* (1746).

(*o*) Lamb. bk. 4, c. 2 ; 2 Hawk. bk. 2, c. 8, s. 50 ; 5 Burn, 30th ed., tit. *Sessions of the Peace*, sect. 2.

(*p*) Dalton, c. 185, gives the form of this precept or warrant. See 2 Hawk. bk. 2, c. 8, s. 49 ; and as to the attendance of constables, see now 7 & 8 Vict. c. 33, s. 8, *post*, Chap. II. s. 7, *Constables*.

for if it be irregular, but two or more justices, the jury, and all persons necessary to hold a sessions appear, the proceedings of that sessions, if regularly transacted, will be valid (*q*).

A supersedeas out of Chancery is the only authority capable of superseding a precept duly issued by two justices for holding a general session (*r*); and though it was formerly said that two or more general sessions might lawfully be holden at one time within the same county on precepts issued to the sheriff by different sets of justices, the service at one of which would discharge the juror, &c. from service at the others (*s*), it is very doubtful, since *R. v. Sainsbury* (*t*), whether either general session so held would be valid; and it is certain that if attempts to hold such several sessions were made without apparently good reason, or for sinister purposes of harassing parties, &c., &c., the justices issuing them would be liable to indictment or information, and would afford reason to the lord chancellor for striking their names out of the commission (*u*).

In counties the following may be adopted as the form of— Form of
precept.

Precept to the Sheriff (*x*).

County of ——— { We, A. B. and C. D. Esqrs., two of the justices of
our Sovereign Lord the King, assigned to keep the
peace in the county of ——— aforesaid, and also to hear and determine
divers felonies, trespasses and other misdemeanors committed in the same
county (*y*) [*one of us being of the quorum*] (*yy*) to the sheriff of the same
county, greeting: On behalf of our said sovereign lord the King, we
command you, that you omit not, by reason of any liberty within your
county (*z*), but that you enter therein, and that you cause to come before
us, or some other justices assigned to keep the peace in the said county,
and also to hear and determine divers felonies, trespasses and other mis-
demeanors in the said county committed, on ———, the ——— day of
———, now next ensuing, at the hour of ——— in the forenoon of the
same day, at ——— in the said county, twenty and four good and lawful
men of the body of the county aforesaid, then and there to inquire,
present, do, and perform all and singular such things, which on the

(*q*) Lamb. bk. 4, p. 380, cited and approved in *R. v. Corporation of Ipswich* (1705), 2 Lord Raym. 1237, 1238.

(*r*) Com. D. *Justices of Peace* (D. 3); 2 Hawk. bk. 2, c. 8, s. 51.

(*s*) Lamb. bk. 4, p. 384.

(*t*) 4 T. R. 451.

(*u*) See Dalton, c. 185.

(*x*) See 19 Viner, tit. *Sessions of the Peace* (A); Imp. Off. Sher. 3rd ed. 252; Dalton, c. 185; 6 Geo. 4, c. 50, s. 20, preserves the powers of the sessions to issue precepts as theretofore.

(*y*) See 19 Viner, tit. *Sessions of the Peace* (A), that the precept is necessary in order to compel the sheriff "to cause" the jurors "to come," and to give sessions power to amerce jurors for non-attendance; and see *post*, Chap. II. s. 9, *Jurors*.

(*yy*) In view of the disappearance of the *quorum* clause from the commission, it is submitted that these words should now be omitted.

(*z*) If there be a liberty, or other franchise in the county, possessing an exclusive jurisdiction, that is to say, a jurisdiction in which the justices of the county at large are prohibited from interfering, it will be proper, as it is usual, to add in this place (*except the liberty of* ——— *within the* same). 4 Chit. C. L. 176, 1st ed.

behalf of our said sovereign lord the King shall be enjoined to them; and also twenty-four [or forty-eight] other good and lawful men of the county, qualified according to law, then and there to try all such issues as may be joined (*a*):—also that you make known to all coroners, keepers of gaols, and houses of correction, high constables (*b*) and bailiffs of liberties, within the county aforesaid, that they may be then and there to do and fulfil the things which, by reason of their offices, shall be to be done. Moreover, that you cause to be proclaimed through the said county, in proper places, the aforesaid session of the peace, to be holden at the day and place aforesaid, and do you be then there, to do and execute those things which belong to your office. And have you then and there as well the names of the jurors, coroners, keepers of gaols and houses of correction, high constables and bailiffs, aforesaid, as also this precept.

Given under our hands and seals at _____, in the county aforesaid,
the _____ day of _____, in the _____ year of the reign of _____
A. B.
C. D.

This should bear teste fifteen days before the return, and should be delivered forthwith to the sheriff, that he may have enough time to proclaim the sessions and to send his warrants to the bailiffs, &c.

When the sheriff shall have received this precept, it becomes his duty to direct several warrants to the bailiffs of liberties and hundreds, containing the substance of it in the following form:—

Sheriff's Warrant thereupon.

Form of
warrant.

County of _____ { P. Q., Esquire, sheriff of the county aforesaid, to
G. H., bailiff of the hundred of _____, in the said
county, greeting: By virtue of a precept under the hands and seals of
A. B. and C. D. Esquires, two of his Majesty's justices appointed to
keep the peace in the said county; and also to hear and determine divers
felonies, trespasses, and other misdemeanors, committed in my said
county [*one of them being of the quorum*] (*bb*), to me directed:

These are in his Majesty's name to will and require you, that you forthwith make known by open proclamation, in every market town, and all other places convenient within the hundred of _____ aforesaid, that the next general quarter session of the peace of and for the county aforesaid is to be holden and kept at _____, in the town of _____, in the county aforesaid, on Wednesday, the _____ day of _____ now next ensuing, at the hour of nine of the clock in the forenoon of the same day; and that you give notice to all justices of the peace, coroners, keepers of gaols and houses of correction and high constables of the said hundred, that they be then and there present to do and perform that which to their

(*a*) In practice, forty-eight, seventy-two or more are returned in order to provide for the contingency of challenges, 2 Hale, 263. By the Jury Act, 6 Geo. 4, c. 50, s. 13, every precept for the return of jurors to sessions "shall direct the sheriff to return a *competent number* of good and lawful men of the body of his county, qualified according to law." In boroughs there are to be "a sufficient number" summoned. 45 & 46 Vict. c. 50, s. 186 (3).

(*b*) The duties of high constables in relation to the Jury Act, 1825, have now ceased (25 & 26 Vict. c. 107), and the office itself is virtually abolished by 32 & 33 Vict. c. 47.

(*bb*) See note (*yy*) on preceding page.

several offices doth appertain: and that all those who ought to prosecute any prisoner or prisoners in the gaol of the said county, or who are bound over then to appear and answer, be then and there present to prosecute against them according to law: and also that you summon and warn the persons whose names are underwritten, that they be then and there present to serve on the grand jury, and to inquire on his Majesty's behalf, for the body of the county aforesaid, for all such matters and things as shall be then and there given them in charge: and also that you summon and warn the persons underwritten, that they be then and there present to serve on the petty jury for his Majesty's service (e); and that yourself be then and there present to make return thereof. And herein neither you nor them may fail at your and their perils. Given under the seal of my office the day of , in the year of the reign of our sovereign lord Edward, by the grace of God of the United Kingdom of Great Britain and Ireland King, defender of the faith, &c., and in the year of our Lord .

Then the sheriff makes his return thus:—

Sheriff's Return of Process to the Sessions (d).

The execution of this precept appears in certain panels hereto annexed: I further certify that I have given notice to all coroners, keepers of gaols and houses of correction, high constables and bailiffs of liberties within my county, to be and appear at the time and place within mentioned, to do and perform, &c., and have cause to be proclaimed through my county in proper places the sessions within mentioned.

The answer of .

Then on a piece of parchment are written the names of the jurors, thus:—

Grand Jury: (or sometimes, The names of jury to inquire, &c.)	Petty Jury: (or sometimes, The names of the jurors to try.)
Sir R. H., Bart.	A. B.
A. B., Esq.	C. D., &c. (f).
C. D., Esq. (naming them (c)).	

Also the names of the justices of peace, coroners, keepers of gaols and houses of correction, high constables, &c.

The precept in boroughs should go under the hand and seal of the recorder to the clerk of the peace, whose duty is, by the 186th section of the 45 & 46 Vict. c. 50, to give public notice of the time and place of holding every such quarter sessions of the peace ten days at the least before the holding thereof; and seven days at the least before the holding thereof to cause to be summoned a sufficient number of persons, being qualified and liable as aforesaid, to serve as grand jurors, and also a sufficient number of persons qualified and liable to serve as jurors at such sessions. In boroughs.

(c) The sheriff may now summon jurors by post, 25 & 26 Vict. c. 107, s. 11. See *post*, Chap. II. s. 9, *Of the Jurors*.

(d) The return to the precept is still to be made in the manner before accustomed: 6 Geo. 4, c. 50, s. 20.

(e) Not less than *twelve*, nor more than *twenty-three* names: *R. v. Marsh* (1837), 6 Ad. & E. 236, 241. See *post*.

(f) With, at least, twenty-two, generally forty-six, or even seventy.

SECTION 4.

TIME AND PLACE FOR HOLDING QUARTER SESSIONS.

Time for
holding in
counties.

11 Geo. 4 & 1
Will. 4, c. 70,
s. 35.

With respect to counties, it is enacted that justices shall make or keep their sessions at least four times a year (*g*), and in every quarter of the year (*h*), and the times for holding the same were also fixed by 25 Edw. 3, st. 2, c. 7, 36 Edw. 3, c. 12, 2 Hen. 5, st. 1, c. 4, and 54 Geo. 3, c. 84, and the last three mentioned of these enactments are still unrepealed; but by 11 Geo. 4 & 1 Will. 4, c. 70, s. 35, after reciting that the general quarter sessions of the peace are now directed to be held in each year in the first week after the 11th day of October, in the first week after the Epiphany, in the first week after the clause of Easter, and the first week after the translation of St. Thomas the Martyr, and that it is expedient that the times for holding the general quarter sessions of the peace should be altered in part, enacts that, the justices of the peace in every county, riding or division, for which quarter sessions of the peace by law ought to be held, shall hold their general quarter sessions of the peace in the first week after the 11th day of October, in the first week after the 28th day of December, in the first week after the 31st day of March, and in the first week after the 24th day of June; and that all acts, matters and things done, performed and transacted at the times appointed by this Act for the holding of the general quarter sessions of the peace, shall be as valid and binding to all intents and purposes as if the same had been done, performed and transacted at general quarter sessions of the peace holden at the times by law limited for the holding thereof before the passing of this Act; and it is now enacted by the Quarter Sessions Act, 1894 (57 Vict. c. 6), that the justices assembled in general quarter sessions, or at any adjourned or special meeting thereof (which special meeting they are hereby authorized to hold), may at any time when it may appear desirable for the purpose of not interfering with the assizes then next ensuing fix and alter the time for holding the then next general quarter sessions so as the sessions be held not earlier than fourteen days before nor later than fourteen days after the week in which they would otherwise be held.

Statute direc-
tory as to
time.

Under the 54 Geo. 3, c. 84, it has been decided, that though it is provided by that Act that the quarter sessions for the Michaelmas quarter should be holden in the first week after the 11th of October instead of the time before then appointed

(*g*) 25 Edw. 3, stat. 2, c. 7; 36 Edw. 3, c. 12; 2 Hen. 5, stat. 1, c. 4.
(*h*) 12 Rich. 2, c. 10.

for holding the same, that this Act is directory only, and the Michaelmas quarter sessions may be lawfully holden in another week than that so specified by the statute (*i*). The words "in the first week after," the days mentioned in 11 Geo. 4 & 1 Will. 4, mean the first whole week after those days; so that, if the 11th of October, the 28th of December, the 31st of March, or the 24th of June, should fall on a Sunday, the sessions fixed to be held with reference to those days respectively would not be held in that same week, or till the Monday or some other day in the week following (*k*).

By 45 & 46 Vict. c. 50, the recorder of every borough shall hold, once in every quarter of a year, or oftener, if and as he thinks fit, or the Secretary of State directs, a court of quarter sessions in and for such borough. Borough sessions.

The place of holding quarter sessions in counties, divisions, ridings or liberties, not being boroughs affected by the Municipal Corporations Act (45 & 46 Vict. c. 50), is not determined by any statute law; but the justices who issue the precept to summon a quarter sessions may, in their discretion, name any place meet for access within the ambit of the jurisdiction for which it is summoned as that where it is to be holden, and the parties bound to appear at such sessions, by recognizance or by their official situations, will be bound to attend at such place (*l*). Place of holding.

Dalton states the wilfully holding of a sessions on the confines of a county to be punishable; but as in some counties, as Sussex, Suffolk, &c., where large collections of population lie at a distance from the county-town, each session is held, by adjournment (*m*), at two or more of the principal towns within it successively, thus avoiding as far as possible the carrying prisoners from place to place. If the precept name one town, the session may still be held at another, and the presentments at the latter will be good, but no man can be amerced for want of appearance (*n*).

(*i*) *R. v. Justices of Leicester* (1827), 7 B. & C. 6. See 2 Hale, P. C. 50.

(*k*) 2 Hale, P. C. 49.

(*l*) Jenk. Cent. 212, pl. 49. See Dalton, c. 185; also as to a county created within another county, *ib*.

(*m*) See *R. v. West Torrington* (1749), Burr. Sett. Cas. 293.

(*n*) Jenk. Cent., *ubi sup.*; Lambard, lib. iv. c. 2, cited 19 Viner, tit. *Sessions of the Peace* (*e*).

SECTION 5.

OF THE CAPTION—DURATION OF SESSIONS—ADJOURNMENT.

The style is thus:—

Style of the
quarter ses-
sions in
counties.

Shropshire. { The general *quarter* sessions of the peace of our sovereign
at { lord the King, holden in and for the said county of *Salop*
in the town of { , in the said county (*o*), on { day,
the { day of { , in the { year of the reign of our sovereign
lord, Edward the Seventh, of the United Kingdom of Great Britain
and Ireland, and of the British Dominions beyond the Seas, King,
defender of the faith, and so forth—before { and { esquires
(*naming at least two of them*) (*p*), and others their fellows [*or associates*],
keepers of the peace and justices of our sovereign lady the queen, assigned
to preserve the peace in the said county, and also to hear and determine
divers felonies, trespasses and other misdemeanors in the said county
committed [*and of the quorum*] (*q*), and so forth (*r*).

The caption.

The proper caption (*viz.*, the history of the proceedings) (*s*)
is formed by prefixing to the above form,

“Be it remembered that at,”

and adding at the end of it—

“By the oath (*t*) of { (*naming at least twelve, and not more than
twenty-three*) (*u*) grand jurors who found the bill) (*x*), good and lawful men of
the county aforesaid, sworn and charged to inquire for our said lord the
King, and for the body of the county aforesaid, it is presented that”
(*stating the indictment*).

(*o*) Necessary: *Ludlow's case*, Cro. El. 738.

(*p*) *R. v. Almanbury* (1718), Stra. 96; 1 Chit. Cr. L., 1st ed. 331; Cro. El. 738, *Ludlow's case*. If the session be not one of the peace only, but of oyer and terminer, as in Middlesex, where there is also the latter commission, four should be named, *ib.*; *R. v. Atkinson* (1784), reported in 1 Saund. 249, note (*a*). The recorder only need be named in the caption of a borough indictment.

(*q*) It is conceived that the words “and of the quorum” should now be omitted, having regard to the disappearance of the quorum clause from the commission.

(*r*) A mistake of the clerk in certifying the caption of an indictment removed into the Queen's Bench Division by *certiorari* is amendable: *R. v. Atkinson* (1784), reported in note to 1 Saund. 249. This is because the return of the caption to the Queen's Bench Division is merely a ministerial act: *Faulkner's case* (1670), 1 Saund. 249; and all ministerial acts are amendable at common law at any time: *Philips v. Smith* (1718), 1 Stra. 136.

(*s*) See Arch. Crim. Pl., 22nd ed. 84; 2 Hale, P. C. 165.

(*t*) This includes those who affirm. See 6 & 7 Vict. c. 85.

(*u*) For if a number amounting to two full juries or more should be sworn, a complete jury of twelve might find a bill true, though other twelve or many more than twelve might reject it, which would be contradictory and absurd. See 2 Burr. 1089: *R. v. Marsh* (1837), 6 A. & E. 236.

(*x*) It seems that at least the *number* of jurors who find the bill should be stated, and should be not less than twelve. 2 Hale's P. C. 167; and as to this, see appendix to 4 Bla. Com. 1; cited 6 Ad. & E. 240, 243, *R. v. Marsh*. However, the insertion of the *names* has been held in Dom. Proc. to be unnecessary, *R. v. Aylett* (1786), as reported from Dealtry's MSS., 6 Ad. & E. 247, note; *id.* 249; 1 Chit. Cr. L. 333.

The style of an adjourned session should not run, "At a session held by adjournment on" such a day (*y*); but after stating the day of meeting of the original sessions, and the meeting as above, it should go on to allege that it was continued by them (*z*) from thence to such further day by adjournment, and that it was then holden accordingly by such adjournment (*a*).

In pleading it is sufficient to refer to the court as "a general quarter sessions of the peace of our lord the King, held at _____ in the county of _____," without stating the caption (*b*).

The caption is no part of the indictment itself, and is only a copy of the style of the court at which the indictment was found, the time and place where, and the jury by whom it was found: particulars which it must set forth with sufficient certainty. It is however a necessary part of the record, and forms the preamble of it when made up in form as a return into the Court of King's Bench on *certiorari* (*c*), or to be produced at *nisi prius* to satisfy an averment that a "bill of indictment was preferred at the quarter sessions against A. B. which was then and there found a true bill" (*d*). There is but one original general caption for the whole sessions, and from this each particular record is made up (*e*). If upon a *certiorari* the caption appear to be wrong (*e.g.*, in not showing that the sessions had jurisdiction, which may be by stating them to have been held on an impossible day (*f*), or in omitting to show that the indictment was found by persons

(*y*) *R. v. Fisher* (1729), Stra. 865; *St. Michael, Coslany, Norwich v. St. Matthew's, Ipswich* (1727), Stra. 832. See, however, *R. v. Chichester* (1789), 3 T. R. 496.

(*z*) As to variance, see *R. v. Bellamy* (1824), Ry. & M. N. P. C. 171.

(*a*) *R. v. Harrowby* (1737), Burr. S. C. 102; *R. v. Heptonstall* (1736), *id.* 88; *R. v. Saunders* (1729), 2 Sess. Ca. 20.

(*b*) *Stack v. Wilkin* (1832), 3 Tyr. 158.

(*c*) 2 Hale, 165. And, if erroneous, the indictment will be quashed in King's Bench. *R. v. Roysted* (1756), 1 Lord Ken. 255; *R. v. Fearnley* (1786), 1 T. R. 316.

(*d*) *R. v. Smith and others* (1828), 8 B. & C. 341; *R. v. Bellamy, sup.*; *R. v. Ward* (1834), 6 C. & P. 366; *R. v. Foreley* (1838), 8 Ad. & E. 806. The indictment itself indorsed "true bill" is not evidence to prove the finding a true bill: *Porter v. Cooper* (1834), 6 C. & P. 354, *per* Patteson, J.; nor will minute-books of the sessions suffice to prove the finding of an indictment, though the record be afterwards made up from them. See the above cases, and *Cooke v. Maxwell* (1817), 2 Stark. N. P. 183; *R. v. Marsh* (1837), 6 A. & E. 248; *R. v. Pembridge (Inh.)* (1841), 1 C. & M. 157. The minute-book of the sessions headed by a proper caption was admitted to prove an order made by the quarter sessions on an appeal against an order of removal in *R. v. Foreley, ubi sup.* As to proof of enrolment of certificate of justices diverting a highway, see *De Ponthieu v. Pennefeather* (1814), 5 Taunt. 633.

(*e*) *Per Williams and Coleridge, JJ.*, 6 A. & E. 249.

(*f*) *R. v. Fearnley* (1786), 1 T. R. 316.

Assignment
of error in
fact.

competent to do so), the party indicted may demur, in which case the court looks not to the indictment only, but at the whole record, to see whether they are warranted in giving judgment on it; or error in law may be assigned. But the return of the caption being a ministerial act of the officer of the court, it differed from an indictment in being amendable at common law, according to the truth in case of any omission or mistake (*g*). If no fault appears on the caption, there may yet be ground for assigning error in fact (*e.g.*, that the number of grand jurors exceeded twenty-three); that is, if by so doing the record be not contradicted (*h*): or, if it should happen that there is reason for arresting the judgment, the course by motion is open; but after a defendant had pleaded to an indictment, removed it by *certiorari*, and been convicted, the court refused to quash it on the ground that the grand jury before which it was taken exceeded twenty-three in number,—an objection which did not appear on the caption (*i*).

Losing a
sessions.

As without the appearance of at least two justices of the peace, at the day and place fixed, no quarter session can be holden, it is usually considered as lost for the quarter if two justices do not appear (*k*); and though a general session might be subsequently held for general purposes, it is doubtful whether, though held in the same quarter, it would operate as a quarter session for disposing of such business as is expressly made cognizable by a court of quarter sessions, *e.g.*,

(*g*) 1 Chit. C. L. 334; *R. v. Atkinson* (1784), 1 Saund. 249 *in notis*; *Faulkner's case* (1670), 1 Saund. 249.

(*h*) *R. v. Carlisle* (1831), 2 B. & Ad. 362; *R. v. JJ. of Middlesex* (1834), 5 B. & Ad. 1116; and the King's Bench Division will grant a mandamus to compel the clerk of the peace to make up the record. *R. v. Middlesex JJ.*, *ubi sup.*

(*i*) *R. v. Marsh* (1837), 6 A. & E. 243. In this case it appeared by affidavit, that more than twenty-three grand jurors (*viz.*, twenty-eight) had been sworn at a general session for Dover, and an indictment was found by them; the defendant having pleaded to it, traversed and removed it by *certiorari*, and was convicted. The caption of the indictment was drawn up by the clerk of the peace from the minutes of sessions, and returned with it to the Crown Office. This caption stated the presentment to be made by "the oaths of A. B., C. D., &c. (*naming* twelve grand jurors) and others, good and lawful men," &c. A rule was obtained (with a view to a writ of error), calling on the clerk of the peace to show cause why the caption should not be amended by inserting the true names and number of the grand jury sworn. The clerk of the peace did not deny that more than twenty-three were sworn, but stated that he had no minute or recollection of the names or number. Held, that the caption was not incorrect in omitting to state the number and *all* the names of the grand jury, twelve having been named; and that as there was no minute to amend by, the caption could not be altered. Defendant received judgment. [*N.B.*—It seems best to name in the caption each of the twelve jurors who find the bill; but *semb.* not absolutely necessary; *S. C.*]

(*k*) 5 Burn's Justice, 30th ed., tit. *Sessions*, 342.

appeals against a poor rate (*l*). It is said that the court of quarter session, once dropped for want of sufficient justices, cannot be resumed (*m*) or adjourned (*n*); but this is an inconvenience unlikely to arise since the great increase in the numbers of magistrates. One thing is clear, that where one original session has been in part held in a quarter, a second held within the same quarter (unless by adjournment) is not also good as a quarter session, though it may be as an extra original session (*o*).

The whole session, for whatever number of days it continues by regular adjournments, is, in point of law, considered only as one day; and as every proceeding has reference to the first day of the session (*p*), the justices may, before the actual close of the sessions, on whatever day, alter their orders or sentences, and if required to return the record into the King's Bench Division, the order last made should only be certified (*q*). But they cannot do so after the session is closed, *e.g.*, at the next sessions (*r*). Again, if an indictment cannot be disposed of after a verdict of guilty, owing to the justices present being equally divided in opinion as to the sentence, or from any other cause operating on the court (*s*), so that no judgment is given, the better course, in order to prevent any doubt or difficulty from arising, is for an adjournment of the session to be entered by the clerk of the peace to some day previous to or not later than that appointed for the next ensuing original general or quarter sessions (*t*); so as to enable the justices to reconsider the question. At the day, hour and place of adjournment any two or more justices may proceed,

Duration of sessions.

(*l*) See *R. v. Polstead* (1746), Stra. 1263. "All that it was necessary to decide in *R. v. Polstead* was, that the order of sessions was made without jurisdiction, as the quarter sessions were at an end for want of adjournment; and the court said the session (held subsequently in the same quarter) might be a good *general*, but was not a good *quarter*, session. If such were the decision, we find no fault with it." *Per* Patteson, J., in delivering the opinion of several judges at the Old Bailey in *R. v. Mullaney* (1833), 6 C. & P. 100 (proceedings upon Middlesex Special Commission, 1833).

(*m*) *R. v. Polstead*, *sup.*; *R. v. West Torrington* (1749), Burr. S. C. 293.

(*n*) *R. v. Westington* (1749), 2 Bott. 756.

(*o*) *Ante*, p. 28.

(*p*) *R. v. Surrey (Justices)* (1813), 1 M. & S. 479.

(*q*) *St. Andrew's, Holborn v. St. Clement Danes* (1705), 2 Salk. 494. As to the proper mode of entering adjournments in the caption, see *Lingfield v. Batlle* (1702), 2 Salk. 605; *Thurston v. Statford* (1699), Lutw. 377.

(*r*) *R. v. Cockfield* (1696), 2 Salk. 477; *Pigeon's case* (1633), Cro. Car. 241.

(*s*) This is also considered, *post*, Ch. VI., *Of Judgment and Discharge*; and as to adjournment of judgment in appeals, Part III., Ch. 1.; *R. v. Bucks (Justices)* (1825), 6 D. & R. 142; *R. v. Wills (Justices)* (1811), 13 East, 352; and as to style or caption of adjourned sessions, *ante*, p. 31.

(*t*) 2 Hawk. 68; *R. v. Grince* (1717), Trin. 4 Geo. 1; 19 Vinor, 358; *ante*, p. 3.

as they might have done at the original sessions ; the adjournment being a continuation of the same session, and *ex vi termini* implying that everything during the time of it remains *in statu quo* (*u*). Where an adjournment of the case is made from session to session (as distinguished from the sessions being themselves adjourned), the session to which the adjournment is made is competent to pass the sentence (*x*). There is this distinction to be observed between an adjournment of the *session* and an adjournment of the specific matter itself, that in some cases a matter may not be adjourned to a subsequent session, as under the Licensing Act, 9 Geo. 4, c. 61, yet the next session may be adjourned to a subsequent day (*y*), whilst in others, where there is no statutory provision to the contrary, the further consideration of a matter may be adjourned over an intermediate session to a subsequent one (*z*). It may be useful to add, that the adjournment to be valid must be declared by two or more justices, or at least in their presence by the clerk of the peace ; as large a number of them being required to adjourn as to hold a session (*a*). The forms of adjournment are requisite to secure the re-attendance of the jurors after an adjournment at the time and place appointed, and the continuity of the first proceedings till the completion (*b*). Doubts having existed as to the legality of summoning juries for trial of prisoners at adjourned quarter sessions, an Act was passed in 1837 to remove them (*c*). By this Act the justices for any county, riding, division or place within England and Wales, in quarter sessions assembled, and the recorder of any city or borough, at any court of quarter sessions holden in and for the same, when to such justices and recorder respectively it shall seem meet, may direct the clerk of the peace to take the necessary steps for causing juries to be summoned to attend any adjourned court of quarter sessions for the dispatch of its business, in the same manner as they may now be summoned to attend any general quarter sessions ; the juries so summoned

Mode of
adjournment.

(*u*) See this more fully considered, Part III., Ch. I. ; and *per* Lord Kenyon, 7 T. R. 108, 109 ; but if the Act on which the adjourned proceeding is founded be repealed before the adjournment day, the above rule does not hold, and the jurisdiction of sessions is at an end. *R. v. London (Justices)* (1764), 3 Burr. 1456.

(*x*) *Keen v. The Queen* (1847), 16 L. J. M. C. 180 ; *R. v. Reading*, Ca. t. Hardw. 81. If any matter, being undisposed of, is taken up again at a later session without any proper adjournment having been made, either of the sessions themselves or of the matter in question, the proceedings at such subsequent sessions will be quashed. *R. v. West Torrington* (1749), Burr. S. C. 293 ; *R. v. Westmoreland (Justices)* (1735), 2 Bott. 733.

(*y*) *Ravnsley v. Hutchinson* (1871), L. R. 6 Q. B. 305.

(*z*) *R. v. Westmoreland (Justices)* (1868), L. R. 3 Q. B. 457.

(*a*) Middlesex Special Commission, 1833, 6 C. & P. 90 ; *R. v. Westrington* (1749), 2 Bott. 756.

(*b*) *R. v. Payn* (1864), 34 L. J. Q. B. 59.

(*c*) 1 Vict. c. 4.

to attend adjourned quarter sessions having the same duties and powers as if summoned to attend any general quarter sessions. Nothing in the Act is to affect any part of the Jury Act, 6 Geo. 4, c. 50.

SECTION 6.

OF THE QUARTER AND GENERAL SESSIONS FOR MIDDLESEX, LONDON, AND WESTMINSTER.

The sessions in London and Middlesex were exempted from the directions of 54 Geo. 3, c. 84; they are, therefore, subject to various regulations which differ from those prevailing in other parts of England. And the sessions for the city and liberties of Westminster could not formerly be holden during the sitting of the Court of King's Bench in Middlesex, as the exercise of the greater jurisdiction in that county suspended that of the inferior (*d*). 7 & 8 Vict. c. 71, an Act for the better administration of criminal justice in Middlesex, provides by sect. 8, that her Majesty, her heirs and successors, may by sign manual appoint a person, being a barrister at law of not less than ten years' standing (and in the commission of the peace for the said county, and qualified by law to act as justice of the peace), to be the assistant judge of the said court of the sessions of the peace, which said assistant judge shall preside at the hearing of all appeals and at the trial of all felonies and misdemeanors in the said court and all matters connected therewith, and shall hold his office during good behaviour: provided always, that nothing in this Act contained shall interfere with the appointment of the chairman of the said court for all purposes except the trials of appeals and of felonies and misdemeanors and other matters connected therewith, but such appointments shall remain in the said justices as before the passing of this Act: provided also that the said assistant judge, so long as he shall hold the said office, shall not be eligible to sit in parliament.

7 & 8 Vict.
c. 71.

Appointment
of assistant
judge.

By sect. 9, that the presence of another justice of the peace shall not be essential to the formation of the court in those cases in which it is directed by this Act that the assistant judge or his deputy for the time being shall preside; but nothing in this Act contained shall lessen the jurisdiction of the justices at the said sessions.

By 14 & 15 Vict. c. 55, s. 15, the court of quarter or general sessions, or adjourned sessions of the peace for the county of Middlesex, shall possess the same powers for dividing such court of general or quarter or adjourned sessions as are now

Power of
dividing
Court.

(*d*) Note the distinction between the Court of King's Bench sitting in the county and the Justices of Assize sitting under a commission of oyer and terminer and gaol delivery (*ante*, p. 19).

possessed by the courts of quarter and general and adjourned sessions of the peace in counties in which there is an order in force for the appointment of a permanent chairman and deputy-chairman, and whensoever such court shall exercise such power the assistant judge shall appoint a person qualified to act as deputy assistant judge to preside as chairman with the justices who shall be appointed to sit apart: provided always, that the name of the person who shall be so appointed shall, at some previous time, have been transmitted to and approved of by one of her Majesty's principal secretaries of state as a fit and proper person to be from time to time appointed as such deputy assistant judge.

Sect. 16. The presence of one of the justices so as aforesaid set apart, shall not be essential to the formation of the court in which such deputy assistant judge shall preside; but the jurisdiction of such justices shall not be in any way lessened by such appointment.

Assistant
judge *pro tem.*

By 22 & 23 Vict. c. 4, s. 3, during any vacancy in the office of such assistant judge, or when and so often as such assistant judge for the time being shall, for reason of mental or bodily infirmity, or of unavoidable absence, or from other cause, be unable to appoint a deputy pursuant to 7 & 8 Vict. c. 71, it shall be lawful for one of her Majesty's principal secretaries of state by writing under his hand to appoint a person, being a [serjeant or] barrister at law of not less than ten years' standing, to act temporarily as or in the place of such assistant judge until such time as an assistant judge shall be appointed under the said Act, or until the assistant judge shall be able to resume his duties, as the case may require; and such person so appointed under this Act shall have and exercise all such powers and privileges as are given by the said Act to such assistant judge, and shall be paid for his services out of the county rates of the said county any sum not exceeding five guineas per day whilst he shall sit and act as assistant judge.

General
sessions to
have powers
of quarter
sessions.

Sect. 4. Every general session of the peace for the county of Middlesex, and every adjournment thereof, shall have power to try and determine all appeals and all other powers which do now or shall hereafter belong to the general quarter sessions for the said county; and the said justices may and are hereby authorized to hold such sessions or adjournment thereof at the sessions house at Clerkenwell.

Sect. 5. It shall be lawful for any court of general or quarter sessions holden in and for the said county of Middlesex to spare or remit, if it shall be thought fit, any fine imposed at a previous session upon any juror for non-attendance or other default.

CHAPTER II.

OF THE PERSONS COMPOSING THE COURT AND THE OFFICERS
AND OTHERS ATTENDANT ON THE SESSIONS, THEIR
QUALIFICATIONS, RIGHTS, POWERS AND DUTIES.

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SECTION 1.

OF THE CUSTOS ROTULORUM.

THE principal person of the justices and others constituting a court of session of the peace is the *Custos Rotulorum*, or keeper of the records of the county. He is always a justice of the peace (and formerly always of the quorum) within the county for which he is appointed, and is its first civil officer, as the lord lieutenant is the chief in such military command as can now be exercised independently of the Mutiny Act (a). These offices are frequently holden by the same person, but their appointments are as distinct as their duties. This office is in itself rather ministerial than judicial. He was accordingly referred to in the last clause of the former commissions of the peace in these terms:—"Lastly, we have assigned you the aforesaid A. B. Keeper of the Rolls of our peace, in our said county, and therefore you shall cause to be brought before you and your fellows, at the days and places aforesaid, the writs, precepts, processes and indictments aforesaid, that they may be inspected, and by a due course determined, as is aforesaid." This clause, as will be seen, appears in the present form of commission of the peace in an altered form.

The office of *custos rotulorum* is not immemorial, as the commission of the peace itself had its origin within time of legal memory; but it began in very early times. There is no

Origin of the
office.

(a) 4 Steph. Black. 5th ed. 399.

distinct trace of its first constitution; but it probably arose very soon after the holding of sessions of the peace began, from the necessity or convenience of having some high and responsible officer to keep the records, which before were promiscuously dispersed among the justices (*b*). When such necessity arose it belonged of right to the crown to appoint some particular person to have the custody and charge of the records, who might be a person responsible for the safe keeping of them, and to whom the subject might have resort when he had occasion to use them (*c*). So that formerly though in contemplation of law the records were in the possession of all the justices of the court, all *writs of certiorari* and *of error* being addressed to them, yet in fact they were in the custody of the *custos rotulorum*; and if by neglect or misconduct they were lost or miscarried, he was responsible to the crown and the subject for such loss or miscarriage (*d*).

In practice the sessions records were kept by the clerk of the peace, who was appointed by the *custos*, and acted as his deputy.

But now by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s 83, "The clerk of the peace of a county . . . shall be from time to time appointed by the standing joint committee of the county council and the quarter sessions . . . [and] shall, subject to the directions of the *custos rotulorum*, or the quarter sessions, or the county council, as the case may require, have charge of and be responsible for the records and documents of the county."

It is submitted that under the above section the *custos rotulorum* and the quarter sessions have no jurisdiction to give any directions to the clerk of the peace concerning any records or documents of the county other than the records of the quarter sessions, and of the peace, and *vice versâ*.

It would seem to be doubtful whether, under the above section, the court of quarter sessions has power conferred upon it, concurrent with that of the *custos*, to give directions to the clerk of the peace concerning all and every the records and documents of the quarter sessions, and of the peace; or whether a distinction is to be drawn between the records of the quarter sessions and other records and documents of the peace, so that the court of quarter sessions alone has power to give directions to the clerk of the peace concerning the records of the court, whilst the *custos* alone has the right to give directions with respect to other records and documents of the peace. Unless this last suggestion is well founded the clerk of the peace might find himself in a difficulty in the possible, though improbable, event of inconsistent directions being

(*b*) *Per Holt, C. J.*, in *Harcourt v. Fox* (1693), 1 Shower, 528.

(*c*) *Ibid.*

(*d*) *Ibid.*; Com. Dig. tit. *Justices of Peace* (D. 4).

given to him by the quarter sessions and the *custos* with reference to the same records.

By sect. 64 of the same Act, on and after the day appointed for the Act to come into operation all property of the quarter sessions of a county, or held by the clerk of the peace, shall pass to and vest in, or be held in trust for the county council: provided *inter alia* that the existing records of or in the custody of the court of quarter sessions shall, subject to any order of that court, remain in the same custody in which they would have been if this Act had not passed (*e*). This section would seem to give the court of quarter sessions jurisdiction with reference to documents which were in existence at the commencement of the Local Government Act, 1888, overriding or displacing as to the documents within the operation of the section the authority of the *custos rotulorum*.

The *custos rotulorum* can only be appointed or removed by "bill signed with the kinges hande," on which the lord chancellor issues his commission (*f*), and the saving for the archbishop of York, the bishops of Durham and Ely, and all to whom the king or his progenitors by letters patent had granted any liberty to appoint a *custos rotulorum*, to exercise the power so granted, is repealed as to the above ecclesiastics by statutes of the last reign (*g*). How appointed.

SECTION 2.

OF JUSTICES.

The old statutes generally direct respecting justices of the peace, that "they shall be of the most sufficient knights, esquires, and gentlemen of the law" (*h*). They must be resident within the counties for which they act (*i*). And they must be In counties—
qualification
of, by estate.

(*e*) Sect. 83 of the Act makes special provisions for the custody of the then existing records of the counties of Sussex, Suffolk and London.

(*f*) 37 Hen. 8, c. 1, repealed by 3 & 4 Edw. 6, c. 1, and revived by 1 W. & M. sess. 1, c. 21, s. 4.

(*g*) 6 Will. 4, c. 19, s. 3; 6 & 7 Will. 4, c. 87, s. 7. Much learning on the subject of the *custos rotulorum* and his former right to appoint the clerk of the peace will be found in *Harcourt v. Fox* (1693), 1 Shower, 516, and *Harding v. Pollock* (1829), 6 Bing. 25.

(*h*) 13 Rich. 2, st. 1, c. 7; and 2 Hen. 5, st. 2, c. 1.

(*i*) 2 Hen. 5, st. 2, c. 4; but by 11 & 12 Vict. c. 42, s. 5, where any justice for any county, riding, division, liberty, city, borough or place, shall be also justice of the peace for a county, riding, division, liberty, city or place next adjoining thereto or surrounded thereby, such justice may act in all matters and things whatsoever concerning or relating to any or either of the said counties, provided he be resident or happens to be in *one* of them.

By 11 & 12 Vict. c. 42, s. 6, justices acting for any county at large, or for any riding or division of such county, are empowered to act as such

entitled, in law or equity, for their own use in possession, to a freehold, copyhold or customary estate for life, or for some greater estate, or an estate for some long term of years, determinable upon one or more lives, or for a certain term originally created for twenty-one years or more, in lands, tenements or hereditaments, in England or Wales, of the clear yearly value of 100*l.*, above what will discharge all incumbrances affecting the same, and all rents and charges payable out of the same; or be entitled to the immediate reversion or remainder of and in lands, &c. leased for one, two or three lives, or for any term of years determinable on the death of one, two or three lives, upon reserved rents of the clear yearly value of 300*l.*; and if any justice shall act without such qualification, he shall forfeit 100*l.* (*k*).

An estate of more than 300*l.* a year, held in trust for the wife of the justice for life, with remainder to him for life and remainder to their children, was held not to give a qualification to the justice, for he had no control over the wife's interest (*l*).

A sequestration on a benefice is a charge and incumbrance upon the life estate of the incumbent within 18 Geo. 2, c. 20; but if the incumbent be licensed by the bishop to perform the spiritual duties of the benefice and reside in the parsonage house, his estate for life therein is not affected by the sequestration, and if that be of the value of 100*l.* he will be qualified to act.

Where, however, the incumbent resided upon a house and lands, both together worth more than 100*l.* a year, but the house was not worth so much, it was held that, as the lands might be disposed of by the sequestration, he was not qualified; and further, that the assignment of a salary out of the profits exceeding 100*l.* a year did not confer a qualification (*m*).

at any place within any city, town, or other precinct, being a county of itself, or otherwise having exclusive jurisdiction, and situated within, surrounded by, or adjoining to, any such county, riding, or division respectively. But this does not extend to give such justices any authority to intermeddle in any matters or things arising within any such city, town or precinct.

And by 2 & 3 Vict. c. 82, justices of peace acting for any county may act in all things whatsoever concerning or in anywise relating to any detached part of any other county which is surrounded in whole or in part by the county for which such justices act. Constables are to obey their warrants, and expenses occasioned by any act of such justice in or with respect to such detached part shall be repaid by the county to which it belongs. And this is explained by 11 & 12 Vict. c. 42, s. 7.

(*k*) 18 Geo. 2, c. 20, s. 1. It is not sufficient that the party acting as magistrate be possessed of the qualification required at the time of his taking upon himself the office, but he must continue to possess it as long as he continues to act, or he will incur the penalty. See *Wright v. Horton* (1816), Holt, N. P. 458.

(*l*) *Woodward v. Watts* (1853), 2 E. & B. 453.

(*m*) *Puck v. Tarpley* (1839), 8 L. J. (N. S.) M. C. 93.

In boroughs within the Municipal Corporations Act, 1882, the justices assigned under that Act may act without having any qualification by estate, or being burgesses of the borough for which they act; but they must reside within the borough, or within seven miles thereof, during the time they shall act, or occupy a house, warehouse or other property in the borough (*n*).

A borough justice has, with respect to offences committed and matters arising within the borough, the same jurisdiction and authority as a justice for a county has under any local or general Act with respect to offences committed and matters arising within the county; except that he may not, by virtue of his being a justice for the borough, act as a justice at any court of gaol delivery or quarter sessions, or in making or levying any county or borough rate (*o*).

By 34 & 35 Vict. c. 18, it is enacted that no person shall be capable of becoming or being a justice of the peace for any county in England or Wales (not being a county of a city or county of a town) in which he shall practise and carry on the profession or business of an attorney, solicitor or proctor; and where any person practises or carries on such profession or business in any city or town, being a county of itself, he shall, for the purposes of this Act, be deemed to carry on the same in the county within which such city or town, or any part thereof, is situate (*p*).

And, for the purposes of this Act, a person shall be deemed to practise and carry on his profession or business in the county, city or town in which he maintains an office or place of business; and the word "county" shall mean and include a riding or division of a county having a separate commission of the peace (*q*).

And, by sect. 3, nothing in the Act contained is to affect coroners.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 32, "Where a debtor is adjudged bankrupt he shall, subject to the provisions of this Act, be disqualified for . . . (c) being appointed or acting as a justice of the peace." But this disqualification "shall be removed and cease if and when (a) the adjudication of bankruptcy is annulled; or (b) he obtains from the court his discharge with a certificate to the effect that his bankruptcy was caused by misfortune without any misconduct on his part."

Disqualification.
Bankruptcy.

By the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71), s. 9, "No disqualification arising by virtue of sect. 32 of the principal Act shall exceed a period of five years from the date

(*n*) 45 & 46 Vict. c. 50, s. 157.

(*o*) *Ibid.* sect. 158.

(*p*) 34 & 35 Vict. c. 18, s. 1.

(*q*) *Ibid.* sect. 2.

of any discharge which may have been, or may hereafter be, granted under and by virtue of the principal Act, or of this Act."

Shrieveralty.

By the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 17, re-enacting the prohibition of the statute 1 Mary, sess. 2, ch. 8, to the like effect, a person shall not, while he is sheriff of a county, act as a justice of the peace for that county, and if he does so act, all his acts done as such justice of the peace shall be void.

According to better opinions, a coroner cannot act as a justice of the peace, although there is no statute to forbid him, on the principle that no one ought to be a judge in a court of which he is an officer (*r*). Moreover, the coroner may, under certain circumstances, be called upon to perform the duties of sheriff.

Interest in
matters *sub*
judice.

A justice of the peace is disqualified at common law from acting in a judicial matter in which he has a pecuniary interest, however small, unless the parties before him agree to waive any objection of that nature (*s*); but circumstances not amounting to a pecuniary interest, from which a suspicion of favour or bias may arise, would not alone amount to a disqualification, though it would be wrong in such a case of a justice to act (*t*).

Where by the express terms of a statute (the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, s. 3), it was enacted that "justice" should mean "a justice, &c. *who should not be interested in the matter*," it was held that the definition was merely declaratory of the common law, and therefore where, on the hearing of a matter under the Act, an objection to a justice on the ground of interest was waived by the parties, it was held that the justice had jurisdiction, and that the objection of want of jurisdiction could not afterwards be raised (*u*).

In highway
matter.

In a case where a justice of the peace was also a surveyor of highways, and a matter which concerned his office coming in question at the sessions, he joined in making the order, and his name was put in the caption, it was held that the order was void, and it was quashed.

On removal
appeals.

So it has been determined that on an appeal to the sessions against an order of removal, those justices who are rated to the relief of the poor in either of the contending parishes have not a right to vote (*x*); and where of two magistrates who signed an order of removal one was a churchwarden of the removing parish, the order was held bad on that ground,

(*r*) Dalt. c. 3.

(*s*) *Wakefield Local Board of Health v. West Riding and Grimsby Rail. Co.* (1865), L. R. 1 Q. B. 84.

(*t*) *R. v. Rand* (1866), L. R. 1 Q. B. 230.

(*u*) *Wakefield Local Board v. West Riding and Grimsby Rail. Co.*, *ubi sup*.

(*x*) *R. v. Yarpole* (1790), 4 T. R. 71.

for, as such churchwarden, he was a party to the complaint upon which the order was made (*y*). And where the order of sessions was made upon an appeal against a rate, and three magistrates who were interested took a part in the decision, it was held, that the court was improperly constituted, and the decision invalid (*z*). Where a waterworks company were appellants against a poor rate, an order reducing the rate and taxing the appellants' costs was held bad, because the deputy recorder by whom the appeal was heard and the order made was a shareholder in the appellants' company, though he had in fact sold his shares, but the transfer had not been completed (*a*); and also a subsequent order for costs on the same appeal was held bad, because the deputy recorder was a ratepayer in one of the parishes other than the respondent's parish, in the same union, which parishes all contributed to the common fund out of which the costs would be payable (*b*). And in *R. v. Gudridge* (*c*), it was held that a justice of the peace who was a rated inhabitant of a parish could not vote at sessions upon the determination of an appeal against the allowance of the accounts of the overseers of his parish, or upon the propriety of granting a case for the opinion of the Court of King's Bench which was part of the order on the appeal. And where a prosecution was instituted and conducted under the Salmon Fishery Act, 1861, by the agents of an association for the preservation of salmon, and a conviction was obtained before justices who were active members of the association which paid watchers, one of whom laid the information, the conviction was quashed on the ground that the justices who made it were interested in the result and even parties to the prosecution (*d*).

In prosecutions.

And in the following cases justices have been held disqualified on account of interest or bias, and the order or conviction has been quashed.

Disqualification for interest or bias.

A justice who was a ratepayer proposed a resolution at a meeting calling upon S. to remove a nuisance; proceedings were afterwards taken against S., at which the justice adjudicated (*e*). Here the justice was disqualified, not only on account of the part he had taken at the meeting, but also because he was pecuniarily interested as a ratepayer in the terms of the special order made in the case.

Where the Local Government Board complained to a town council of a nuisance, and the council took out a summons

(*y*) *R. v. Great Yarmouth* (1827), 6 B. & C. 646.

(*z*) *R. v. Paving Commissioners of Cheltenham* (1841), 10 L. J. M. C. 99.

(*a*) *R. v. Recorder of Cambridge* (1857), 27 L. J. M. C. 160.

(*b*) *Ibid.*

(*c*) (1826), 5 B. & C. 459.

(*d*) *R. v. Allen* (1864), 33 L. J. M. C. 98; *R. v. Henley*, [1892] 1 Q. B. 504.

(*e*) *R. v. Gaisford*, [1892] 1 Q. B. 381.

against B., two members of the council sat as justices on the hearing and were disqualified (*f*); and a member of a sanitary committee who orders a prosecution under the Public Health Act, 1875, despite sect. 258 of that Act (*g*); and a justice who is a shareholder in a railway company who convicts a man of travelling on the railway without a ticket (*h*); a justice who is a member of a privileged class (such as a licensed pilot), cannot adjudicate in proceedings taken against a person for an infringement of the privileges of that class (*i*).

A chairman of magistrates at special sessions for appeals against a poor rate took part in all the cases except his own, in which he was appellant; he then left the bench and conducted his own case: it was held that all the previous orders were bad (*k*). And where at the hearing and determination of an appeal against a refusal to grant an exciseable licence under 9 Geo. 4, c. 61, s. 27, one of the justices who refused the licence was present on the bench, and during the hearing conversed with some of the magistrates: held, that the order of sessions was invalid (*l*).

Where a local board made arrangements with H., the owner of a farm, under which he took the board's sewage, and disagreements arose, and the board took steps to enforce the agreement, and in the meantime H. was prosecuted by a neighbouring body for causing a nuisance, and the chairman of the local board sat as a justice: it was held that he was disqualified from sitting, and it was immaterial what part he really took in the matter (*m*). And on an appeal to quarter sessions against a rate made on a railway company, a justice on the bench remarked he was an *ex officio* guardian, whereupon the parties waived all objection to his sitting. It was afterwards discovered that the justice had been actively engaged at various meetings defending the rate, and voting that the cost of defending it should be paid by his board of guardians: held, that the order of sessions must be quashed (*n*).

And see a parallel case, in which it was held that a county council in determining certain applications are acting judicially, and are bound by the same principles as are binding on justices in determining questions which come before them for judicial decision; and where members of the council instruct counsel to represent them, and oppose an application made to the council, and such members are present at the

(*f*) *R. v. Milledge* (1879), 4 Q. B. D. 332.

(*g*) *R. v. Lee* (1882), 9 Q. B. D. 394.

(*h*) *R. v. Hammond* (1863), 9 L. T. 423.

(*i*) *R. v. Huggins, ex parte Clancy*, [1895] 1 Q. B. 563.

(*k*) *R. v. Great Yarmouth JJ.* (1882), 8 Q. B. D. 525.

(*l*) *R. v. Surrey JJ.* (1855), 1 Jur. (N. S.) 1138.

(*m*) *R. v. Mayer* (1875), 1 Q. B. D. 173.

(*n*) *R. v. Cumberland JJ.* (1888), 58 L. T. 491.

hearing but do not vote, their presence vitiates the proceedings, and a mandamus to hear and determine the application according to law was made absolute (*o*). And a magistrate, being a member of a temperance body which is opposing the transfer or renewal of a licence, is disqualified from taking part as a licensing justice in the decision of the question (*p*).

And where, under an agreement between a borough corporation and a brewery company, it was agreed, *inter alia*, that if an application about to be made to the borough justices for a new licence were granted the brewery company should pay the corporation a certain sum, and several members of the corporation who had taken an active share in the negotiations sat as justices on the licensing committee and at the meeting of the confirming authority and granted the licence: it was held that there was a real likelihood of bias on the part of the before-mentioned justices, and a writ of *certiorari* must be issued (*q*).

And where three justices were shareholders in and directors of a boarding-house company which applied for the grant of a licence, and the justices transferred their shares to co-directors and sat as licensing justices and granted the licence, a rule was made absolute for quashing the licence (*r*).

But a justice is not disqualified under 16 Geo. 2, c. 18, ss. 1 and 3, from sitting in special (not quarter) sessions to hear appeals against rates, notwithstanding that the justice is rated to the relief of the poor in the parish for which the rate appealed against was made (*s*), and the jurisdiction is not affected by sect. 6 of 27 & 28 Vict. c. 99 (*t*). Nor is a justice disqualified because he is a subscriber to a country branch of a society which institutes from London prosecutions over which such country branches have no control (*u*), or is an ordinary member of The Law Society and adjudicates in proceedings taken by the Council (which alone has such power) of The Law Society against an unqualified person (*x*). Nor was a magistrate disqualified who was a doctor and attended a person injured by an assault and endeavoured to effect a settlement of the case, and was ultimately subpoenaed for the prosecution (*y*).

A subscription to a fund may be *prima facie* evidence of partizanship; but a magistrate who subscribed to a fund to pay for an application in bastardy was held to do so from a desire

(*o*) *R. v. London County Council*, [1892] 1 Q. B. 190.

(*p*) *R. v. Fraser* (1893), 57 J. P. 500.

(*q*) *R. v. Sunderland JJ.*, [1901] 2 K. B. 357.

(*r*) *R. v. Hain and others* (1896), 40 S. J. 458.

(*s*) *R. v. Bolingbroke*, [1893] 2 Q. B. 347.

(*t*) *Workington Overseers, Ex parte*, [1894] 1 Q. B. 417.

(*u*) *R. v. Deal JJ.* (1881), 45 L. T. 439.

(*x*) *R. v. Burton, ex parte Young*, [1897] 2 Q. B. 468.

(*y*) *R. v. Farrant* (1887), 20 Q. B. D. 58.

that both parties should be in the same position, and that the truth should be elicited and justice done (*z*).

And it is not enough to allege that the justices or one of them had strong views on the subject appertaining to the offence of which the defendant is convicted (*a*). Nor was there held to be any real likelihood of bias where an application for the removal of a licence to new premises was granted; and at the hearing a suggestion was made that if the application were granted certain premises would be given to the corporation for a public improvement. Three of the justices were members of the corporation, and sat also in the confirming authority, before which body, however, the offer of the premises was withdrawn (*aa*).

In a recent case a justice signed a petition in favour of the grant of a licence, and subsequently sat as one of two justices before whom the application was made and granted. It was held by Day and Lawrence, JJ., that the justice was not disqualified from acting (*b*). But justices sitting as a licensing committee act administratively and not judicially (*bb*).

The objection to the justice, if known, must be taken at the trial; if it is not known, it is not assented to (*c*). It is competent for the parties to waive an objection, and so make an order of the justice binding on them; and parties cannot be allowed to take their chance of a decision in their favour, and then, when they find it against them, seek to avert it by an objection (*d*).

On appeal against a conviction for an offence against a bye-law of a railway company, in which the company were prosecutors, an order of sessions affirming the conviction was held null and void because some of the justices affirming the conviction were shareholders in the company (*e*). And even where no actual vote was given by the interested justice, his presence and interference at the hearing of the appeal by remaining on the bench and communicating with the other justices vitiated the proceedings (*f*). Therefore, it is the duty of an interested justice to voluntarily withdraw from the court when the appeal is called on (*g*).

Duty to withdraw.

Disqualification by interest removed in certain cases.

In certain cases by statute a justice who is interested in certain matters is allowed to act in such matters, but chiefly out of sessions. Thus, by 16 Geo. 2, c. 18, justices within their jurisdiction may do and execute all acts, matters and

(*z*) *R. v. Norfolk JJ., ex parte Chamberlain* (1870), 34 J. P. 773.

(*a*) *Wilder, Ex parte* (1902), 66 J. P. 761.

(*aa*) *R. v. Tempest* (1902), 18 T. L. R. 433.

(*b*) *R. v. Taylor, ex parte Fogerill* (1898), 62 J. P. 67.

(*bb*) See *Boulter v. Kent JJ.*, [1897] A. C. 569.

(*c*) *R. v. Richmond JJ.* (1860), 24 J. P. 422, per Lord Cockburn, C. J.

(*d*) *Wakefield Local Board of Health v. West Riding and Grimsby Railway Co.* (1865), 35 L. J. M. C. 69.

(*e*) *Re Hopkins* (1858), E. B. & E. 100.

(*f*) *R. v. Justices of Suffolk* (1852), 21 L. J. M. C. 169; *R. v. Justices of Hertfordshire* (1845), 6 Q. B. 753.

(*g*) *R. v. Justices of Suffolk, supra*.

things appertaining to their office as justices "so far as the same relates to the laws for the relief, maintenance and settlement of poor persons, for passing and punishing vagrants, for repair of highways, or to any other laws concerning parochial taxes, levies or rates; notwithstanding any such justice or justices is or are rated to or chargeable with the taxes, levies or rates within any such parish, township or place affected by any such act or acts of such justice or justices as aforesaid;" but sect. 3 provides, that this Act or anything herein contained shall not authorize or empower any justice or justices of the peace for any county or riding at large to act in the determination of any appeal to the quarter sessions for any such county or riding from any order, matter or thing relating to any such parish, township or place where such justice or justices of the peace is or are so charged, taxed or chargeable as aforesaid (*h*).

Previously to the Local Government Act, 1894 (56 & 57 Vict. c. 73), coming into operation, special provisions were made by statute as to justices who were *ex officio* members of boards of guardians and members of highway boards, enabling them to act in matters in which such boards were interested (see as to *ex officio* guardians, 5 & 6 Vict. c. 57, s. 15; and as to highway boards, 27 & 28 Vict. c. 101, s. 46, and 25 & 26 Vict. c. 61, s. 38); but by that Act justices have ceased to be *ex officio* members of boards of guardians and the functions of highway boards have been transferred to rural district councils, and such boards have ceased to exist.

By 30 & 31 Vict. c. 115, s. 2, "a justice of the peace shall not be incapable of acting as a justice at any petty or special or general or quarter sessions on the trial of an offence arising under an Act to be put in execution by a municipal corporation, or a local board of health, or improvement commissioners or trustees, or any other local authority, by reason only of his being as one of several ratepayers, or as one of any other class of persons, liable in common with the others to contribute to or to be benefited by any fund, to the amount of which the penalty payable in respect of such offence is directed to be carried or of which it will form part, or to contribute to any rate or expenses in diminution of which such penalty will go."

To secure the object of the provisions respecting the qualification by estate, it is enacted, that no person shall be capable of acting as a justice of the peace, for a county, &c. who shall not, before he acts, at some general or quarter session for the county, or division, &c. for which he intends to act, take and subscribe the following:—

I (*i*), A. B., do swear that I truly and *bonâ fide* have such an estate in law or equity, to and for my own use and benefit, consisting of (*specifying*

The removal of disqualification not to extend to appeals.

Their disqualification from acting in certain matters.

Ex officio member of highway board.

Or on appeals against convictions under Acts put in force by local authority.

Oath of qualification by estate.

Form of oath.

(*h*) *R. v. Recorder of Cambridge* (1857), 27 L. J. M. C. 160.

(*i*) 18 Geo. 2, c. 20, s. 1.

the nature of such estate, whether messuage, land, rent, tithe, office, benefice, or what else) as doth qualify me to act as a justice of the peace for the county, riding, or division of _____, according to the true intent and meaning of an Act of Parliament made in the eighteenth year of the reign of his Majesty King George the Second, entitled "An Act to amend and render more effectual an Act passed in the fifth year of his said Majesty's reign, entitled an Act for the further qualification of justices of the peace," and that the same (*except where it consists of an office, benefice or ecclesiastical preferment, which it shall be sufficient to ascertain by their known and usual names*) is lying, or being, or issuing out of lands, tenements or hereditaments, being within the parish, township or precinct of _____ (*or in the several parishes, townships, or precincts of* and _____) in the county of _____ (*or in the several counties of* and _____) (as the case may be) (*k*).

This oath, so taken and subscribed, is to be kept among the records of the sessions, by the clerk of the peace, who is to deliver an attested copy of it to any person requiring the same, on paying 2s. for it; and such attested copy being proved to be a true copy of such oath will be evidence in any suit brought under the statute which requires the qualification (*l*). Any person who may act as a justice without having taken and subscribed the above oath respecting his qualification, or without being actually qualified according to the declaration contained in it, is liable to a penalty of 100*l.*, one moiety of which is forfeited to the poor of the parish in which he resides, and the other moiety to whoever will sue for the same, in any of the courts of Westminster, within six months after the commission of the offence (*m*). No notice of action is necessary. The acts of a justice as such are not avoided by his not having taken the qualification oath (*n*).

On the trial of any action against a justice for acting without a proper qualification, the proof of the qualification lies on the defendant, and he cannot avail himself of any lands, &c. not specified in his oath, unless he deliver a notice of his intention to insist on such property, &c. to the plaintiff or his attorney, in writing, at or before the time of pleading, specifying such lands, and the parish and county where situated (offices and benefices excepted, which it is sufficient to ascertain by their known and usual names) (*o*).

Where the lands contained in the said oath or notice are, together with other lands, liable to any charges, rents or incumbrances for the purposes of this Act, such lands are deemed chargeable only so far as the other lands are insuffi-

(*k*) Need not be taken by borough justices: 45 & 46 Vict. c. 50, s. 157 (2). If the qualification is under 38 & 39 Vict. c. 51, *post*, the description of the qualification in the oath will be modified accordingly.

(*l*) 18 Geo. 2, c. 20, ss. 1, 2.

(*m*) *Ibid.* sect. 3. See *Wright v. Horton*, *ante*, p. 40.

(*n*) *R. v. Herefordshire (Justices)* (1845), 1 Chit. R. 700; *Margate Pier Company v. Hannam and others* (1819), 3 B. & A. 266.

(*o*) 18 Geo. 2, c. 20, ss. 3, 4, 5.

Actions for penalties.

Notice to insist on qualification not mentioned in the oath.

cient to pay (*p*). And where the qualification, or any part thereof, consists of rent, it is sufficient to specify in such oath or notice, so much of the lands out of which such rent is issuing as are of sufficient value to answer such rent (*q*).

Only one penalty can be recovered in reference to any act done before the commencement of an action (*r*); no proceedings can be had, after notice, in any other action subsequently commenced, for an offence prior to the first action, if it has been commenced *bonâ fide*, &c. without fraud (*s*). And every action to recover the penalty must be brought within six months after the instance of acting without qualification, on which it is grounded (*t*). Qualification by estate.

By the Justices Qualification Act, 1875 (38 & 39 Vict. c. 54), s. 1, "Notwithstanding the said Act (18 Geo. 2, c. 20) or anything therein contained, every person of full age, and who has, during the two years immediately preceding his appointment, been the occupier of a dwelling-house assessed to the inhabited house duty at a value of not less than one hundred pounds within any county, riding, or division in England or Wales, and shall during that time have been rated to all rates and taxes in respect of the said premises, and who is otherwise eligible, shall be deemed to be qualified to be appointed a justice of the peace for such county, riding, or division. Provided always, that no justice appointed in respect of the qualification in this section mentioned shall continue to act as a justice of the peace for any county, riding, or division after he shall have ceased for twelve calendar months to have within such county, riding, or division such qualification."

By sect. 2, "The enactments concerning the description of property qualification and other provisions and penalties having reference to the qualifications now required by law shall be applicable with reference to the qualifications required by this Act."

These provisions, however, respecting pecuniary qualification, only extend to what are usually denominated "*county justices*." They do not extend to persons acting for smaller jurisdictions and liberties, or to certain persons whose qualifications for the magistracy may be inferred from the rank which they possess, or from the offices which they fill. Thus, they do not extend to any city, town, cinque port or liberty having justices of peace within their limits (*u*), nor to any boroughs within the Municipal Corporations Act (*x*), nor to any peer or lord of Parliament, or to the lords of the Privy Qualification not required in certain persons.

(*p*) 18 Geo. 2, c. 20, s. 6.

(*q*) *Ibid.* s. 7.

(*r*) *Ibid.* s. 9.

(*s*) *Ibid.* s. 10.

(*t*) *Ibid.* s. 11.

(*u*) *Ibid.* s. 12. And see 45 & 46 Vict. c. 50, s. 157 (2).

(*x*) 45 & 46 Vict. c. 50, s. 157 (2).

Council, justices of either bench, barons of the exchequer, attorney or solicitor general, or to the eldest son, or heir apparent, of any peer or lord of Parliament [or of any person having the qualification required by 9 Anne, c. 5 (*repealed* by 21 & 22 Vict. c. 26), for a knight of a shire(*y*)] ; nor to the officers of the board of green cloth, or the commissioners and principal officers of the navy, or the two under-secretaries of state, or the secretary of Chelsea college, where they usually have been justices(*z*) ; nor to the heads of colleges, or halls, or the vice-chancellors, or to the mayors of Oxford and Cambridge, who may respectively be justices in the counties of Oxford, Berks and Cambridge, and the cities and towns within them(*a*) ; nor to metropolitan police magistrates(*b*), or county court judges(*bb*).

Oaths.

The Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 6, requires that the oath of allegiance and judicial oath shall be taken by every justice of the peace, whether for a county or a borough, as soon as may be after his acceptance of office.

The oath of allegiance referred to runs as follows :—

“I, _____, do swear that I will be faithful and bear true allegiance to his Majesty King Edward the Seventh, his heirs and successors, according to law.

So help me God” (*c*).

The judicial oath runs as follows :—

Judicial oath.

“I, _____, do swear that I will well and truly serve our sovereign lord King Edward the Seventh in the office of _____, and I will do right to all manner of people, after the laws and usages of this realm, without fear or favour, affection or illwill.

So help me God” (*d*).

Declaration substituted for oath.

When an oath is required to be taken under the Promissory Oaths Act, 1868, every person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath may, instead of taking such oath, make a solemn affirmation in the form of the oath hereby appointed, substituting the words “solemnly, sincerely and truly declare and affirm,” for the word “swear,” and omitting the words “so help me God” (*e*).

Persons before whom oaths taken.

These oaths are to be taken before such persons as his Majesty may from time to time appoint, or in England before the lord chancellor, or in open court before one or more of the judges of the High Court of Justice, or in open court at the general or quarter sessions of the peace for the county, borough or place in which the person taking the oaths acts as

(*y*) 18 Geo. 2, c. 20, s. 13.

(*z*) *Ibid.* s. 14.

(*a*) *Ibid.* s. 15.

(*b*) 2 & 3 Vict. c. 71, s. 3.

(*bb*) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 17.

(*c*) 31 & 32 Vict. c. 72, s. 2.

(*d*) *Ibid.* s. 4.

(*e*) *Ibid.* s. 11.

justice (*f*). Before this Act the person named in the commission, who intended to act as a justice, must have sued out a writ from the Court of Chancery, called, from the first words of it, a writ of *Dedimus potestatem*, to enable him to take the oath of office before some other acting justice or justices, to be certified into the court from which it issued.

If any justice of the peace declines or neglects, when any oath required to be taken by him under this Act is duly tendered, to take such oath, he shall if he has already entered on his office vacate the same, and if he has not entered on the same be disqualified from entering on the same; but no person shall be compelled, in respect of the same appointment to the same office, to take such oath or make such affirmation more times than one (*g*).

Effect of not taking oath.

If any person, required by this Act to make a declaration instead of an oath, declines or neglects to make such declaration, he shall be subject to the same penalties and disabilities, if any, as he would have been subject to for declining or neglecting to take the oath for which the declaration provided by this Act is substituted (*h*).

Neglect to take declaration.

In boroughs under the Municipal Corporations Act, no person assigned to keep the peace within any such borough shall be capable of acting as such justice till he shall have taken the oaths provided to be taken by justices of the peace, except the oath as to qualification by estate, and until he shall have made before the mayor, or before any two or more of the aldermen or councillors of such borough (who is and are authorized to administer the same), a declaration in the following form:—

Borough justices' oaths of office and judicial oath.

“I, A. B., do hereby declare that I will faithfully and impartially execute the office of justice of the peace for the borough of _____ according to the best of my judgment and ability” (*i*).

Declaration of office.

And in the general construction of the Act 18 Geo. 2, c. 20, relating to the qualification of justices, it has been holden, that the acts of justices, who may have omitted any of the forms of their inauguration which the law requires, but who have been commissioned, and are acting as justices, are not therefore invalid, although the justices may be liable either to indictment or to penalties for the omission (*k*).

Previous to the statute 1 Edw. 6, c. 7, it was thought that if a man named in the commission of the peace received any new dignity at the hand of the Crown, his office of justice

Discharge from the commission.

(*f*) 34 & 35 Vict. c. 48, s. 2.

(*g*) 31 & 32 Vict. c. 72, s. 7. See *M'Mahon v. Lennard* (1858), 6 H. of L. Cas. 970.

(*h*) 31 & 32 Vict. c. 72, s. 13.

(*i*) 45 & 46 Vict. c. 50, s. 157.

(*k*) *The Margate Pier Company v. Hannam* (1819), 3 B. & A. 266, *ante*, p. 48.

was thereby determined, but by that statute it was enacted that "although any justice of the peace be made duke, archbishop, marquis, earl, baron, bishop, knight, justice of either bench, or serjeant-at-law, yet he shall remain justice."

As we have already seen, the authority of a justice of the peace may be *suspended for a time*, as where he becomes sheriff, or, being a borough justice, ceases to reside within seven miles of the borough, or to occupy property therein, or becomes subject to the disqualification of bankruptcy, or to any other temporary disqualification. But in addition to any such temporary suspension, the office of justice of the peace may be *determined* in the undermentioned ways, viz.:—

(1) By the demise of the Crown, which operated at common law to determine all commissions of the peace. This inconvenience was provided for by statute 1 Anne, c. 2, by which justices are enabled to act for six months after the demise of the Crown, unless prohibited by the successor, which is done by the issue of a new commission, for the issue of a new commission supersedes the former one. But if the same justice is put in the commission by the succeeding sovereign, he is not obliged to swear to his qualification afresh (*l*).

(2) By writ under the great seal discharging any particular person from being any longer justice (*m*).

(3) By a writ of *supersedeas* superseding the whole commission; but this writ in truth *suspends* the commission rather than *determines* it, seeing that it may be revived again by another writ called a *procedendo*.

(4) By a new commission, which virtually, though silently, discharges all the former justices that are not included therein, for two commissions cannot subsist at once. No justice who has once taken the qualification oath need take it again by reason only of the commission being superseded by a new commission in which his name appears (*n*).

Non-attendance at sessions.

The court of quarter sessions has no authority to amerce any justice of the peace for non-attendance, as the justices of assize *may* for the absence of any such justices at the gaol delivery; for it is a general rule that *inter pares non est potestas*; it being reasonable rather to refer the punishment of persons in a judicial office, in relation to their behaviour in such office, to other judges of a superior station, than to those of the same rank with themselves (*o*). Where a past mayor, without whose presence the session could not be holden under a charter, voluntarily absented himself without sufficient cause, the Court of King's Bench granted an information against him (*p*).

(*l*) 1 Geo. 3, c. 13.

(*m*) Lamb. 68.

(*n*) 7 Geo. 3, c. 9.

(*o*) Hawk. bk. 2, c. 8. See Dalton, c. 185, p. 458.

(*p*) *R. v. Fox* (1706), 1 Stra. 21.

It appears clear, that no judicial act done by justices when sitting as a court of record affords a ground of action against all or any of them (q). A justice of the county and borough of Poole told the grand jury at a general session, "You have not done your duty; you are a seditious, scandalous, corrupt, and perjured jury." For this language an indictment was found against him, but quashed as unprecedented. Lord Mansfield is reported to have said: "Neither party, witness, counsel, jury nor judge, can be put to answer civilly or criminally for words spoken in office. If the words spoken are *opprobrious*, or *irrelevant to the case*, the court will take notice of them as a contempt, and examine them *on information*: and if anything of *mala mens* is found on such inquiry, it will be punished suitably" (r).

He then says, that to proceed by way of indictment is improper. But for extra-judicial language used on or off the bench of justice, a magistrate seems liable. Fraud or misconduct of magistrates in session, in proceeding notwithstanding the issuing of a *certiorari*, may be the ground of a

(q) *Hamond v. Howel* (1673), 1 Mod. 184; thus stated by Lord Tenterden in *Garnett v. Ferrand* (1827), 6 B. & C. 625: "Hamond and other jurymen had been fined and imprisoned by the court at the Old Bailey for acquitting certain persons of a riot whom the evidence showed to be guilty. This was certainly a very strong exercise of authority, calculated to excite, and in fact exciting, great public interest. It was determined by the Court of Common Pleas, on a suit of *habeas corpus*, that the fine and imprisonment was contrary to law, and the parties were discharged out of custody. After this, Hamond brought an action of trespass against the Recorder of London, one of the judges in the commission, for this imprisonment. The defendant by his plea showed the proceedings before the commissioners, and averred that the jury had pronounced a verdict against plain evidence, and the direction of the court in matter of law. The plaintiff traversed the finding against evidence; and upon the pleadings it was held that the action did not lie, because the defendant was a judge of record. This freedom from action and question at the suit of an individual is given by the law to the judges, not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions they may be free in thought and independent in judgment, as all who are to administer justice ought to be. And it is not to be supposed beforehand that those who are selected for the administration of justice will make an ill use of the authority vested in them. Even inferior justices, and those not of record, cannot be called in question for an error in judgment as long as they act within the bounds of their jurisdiction. In the imperfection of human nature, it is better even that an individual should occasionally suffer a wrong than that the general course of justice should be impeded and fettered by constant and perpetual restraints and apprehensions on the part of those who are to administer it. Corruption is quite another matter; so also are neglect of duty and misconduct in it; for these I trust there is, and always will be, some due course of punishment by public prosecution." See also *Scott v. Stansfeld* (1868), L. R. 3 Ex. 220; *Thomas v. Chirton* (1862), 31 L. J. Q. B. 139; *Kemp v. Neville* (1861), 31 L. J. C. P. 158.

(r) *R. v. Skinner* (1772), Lofft, 55.

criminal information against them (*s*). An information was moved for against four persons, who were churchwardens and overseers of Seaford, and also the only justices of the peace for the borough, for refusing to put a substantial householder on the poor rate, with a view to deprive him of his elective franchise, and for refusing to amend the rate on appeal to them in sessions. The court refused the rule to show cause, saying, "That as they were acting in a court of record, with powers entrusted to them by the constitution, it must be a very strong case indeed, with flagrant proofs of their having acted from corrupt motives, that would warrant a rule for an information" (*t*). But this case, as well as Lord Tenterden's judgment in *Garnett v. Ferrand* (*u*), shows that where corruption can be clearly established against magistrates acting illegally, they will be open to criminal information.

SECTION 3.

OF THE SHERIFF OF THE COUNTY.

Duties of
sheriff in re-
spect of
sessions.

The sheriff of the county formerly had important duties to perform in respect of the sessions (*x*). He was bound to provide and make ready a fit and decent place for holding the sessions, unless where this duty was otherwise regulated by statute (*y*). It is his duty to proclaim the sessions in proper places in his bailiwick, to return the grand jury, to summon the petit jury by post (*z*) or otherwise, and to give notice to all stewards, constables, bailiffs of hundreds and liberties, and other officers, to be present and do their duties at the sessions. He ought also formerly to have attended the sessions by himself or his under-sheriff on the justices' summons, to return the precept (*a*), receive fines for the king, and take notice of the sentences; but all these duties are now performed by the clerk of the peace (*b*). He formerly had to take charge of the prisoners (*c*); and, if he neglected to attend, it was said, might be fined by the court (*d*). When the sen-

Levying fines.

(*s*) *R. v. Seton* (1797), 7 T. R. 373.

(*t*) 1 W. Bl. 432.

(*u*) (1827), 6 B. & C. 625, *ante*, p. 53, n. (*q*).

(*x*) As the principal duties of the sheriff have no reference to the business of the sessions, his office is but slightly noticed in this work.

(*y*) *Dalt. Sheriff*, c. 39, 371.

(*z*) 25 & 26 Vict. c. 107, s. 11.

(*a*) See form, *ante*, p. 27.

(*b*) *Wilde v. Morris* (1852), 22 L. J. M. C. 8, *per* Erle, J.

(*c*) *Dalt. Sheriff*, c. 99, 372.

(*d*) *Dalt. Sheriff*, *ubi sup.*; but the authority cited for this position hardly establishes it, as it is the case of a fine imposed by a court of great sessions in Wales, which had, until the abolition of those courts, jurisdic-

tence is that the party be imprisoned till a fine be paid, the sheriff has authority to receive the money at any time. Indeed the prisoner has a right to demand the sheriff to receive it, so that his imprisonment may be terminated (*e*). Upon the delivery of the roll of fines and the writ to levy to the sheriff, he should not levy any fines which he knows to have been paid, though inserted as unpaid (*e*). He is, however, bound to execute the writs and precepts of justices in session, and is responsible for default to the court of which he is an officer, though he may execute any process by deputy (*f*), *e.g.*, to abate a nuisance. Resistance furnishes him with no excuse for leaving process unexecuted, because he is empowered, by statute, to take the power of the county to his aid (*g*). He has the appointment of the under-sheriff and the bailiffs. The county gaol was formerly placed under the direction of the sheriff by early statutes, 14 Edw. 3, c. 10; 19 Hen. 7, c. 10, and the gaoler was merely his deputy, and he had the appointment of a gaoler upon a vacancy; but prisons were, by the 4 Geo. 4, c. 64, and Acts amending the same, put under the control and management of the justices in quarter sessions, and those Acts are now repealed and superseded by the 28 & 29 Vict. c. 126, amended by 40 & 41 Vict. c. 21, under which latter Act the gaoler is appointed by the Home Secretary (*h*). And every prisoner confined in a prison is deemed to be in the legal custody of the gaoler; the former jurisdiction and responsibility of the sheriff, however, being preserved in respect of prisoners under sentence of death (*i*). The sheriff is not liable for the escape from imprisonment of any prisoner confined in any prison subject to the Prison Act, 1877 (*k*). The sheriff is no longer required to deliver to the justices at quarter sessions a calendar of all prisoners in custody for trial at the sessions; but the gaoler of every prison is to deliver such calendar (*l*). At the expiration of his period of office he is directed to turn over all writs and processes then remaining unexecuted to his successor, who is bound to execute and return them (*m*).

His duty as to fines.

Custody of prisoners.

Calendar of prisoners.

tion analogous to courts of assize, and to the superior courts at Westminster. The sheriff of Brecon was, in 1799, fined by the court of great sessions 100*l.* for non-attendance, which sum was levied, and the Court of King's Bench refused to lessen it on *certiorari*. *R. v. Loveden* (1800), 8 T. R. 615.

(*e*) *Wildes v. Morris*, *ubi sup.*

(*f*) Hawk. bk. 2, c. 22, § 2.

(*g*) 50 & 51 Vict. c. 55, s. 8, re-enacting 13 Edw. 1, st. 1, c. 39.

(*h*) 40 & 41 Vict. c. 21, s. 5.

(*i*) *Ibid.* s. 58.

(*k*) 50 & 51 Vict. c. 55, s. 16 (2).

(*l*) 28 & 29 Vict. c. 126, s. 62.

(*m*) 50 & 51 Vict. c. 55, s. 28.

SECTION 4.

OF THE CLERK OF THE PEACE.

His office,
what in
counties.

The clerk of the peace is an officer, by whatever name called, whether clerk and attorney for the Crown, clerk to the justices, or clerk of the peace, appointed to assist the justices assembled in quarter sessions to hear and determine felonies and trespasses under stat. 34 Edw. 3, c. 1, in drawing indictments, arraigning prisoners, joining issue for the Crown, entering their judgments, awarding their process, and making up and keeping their records(*n*), and who, as we have seen, was formerly appointed by the *custos rotulorum*, as of right, by common law(*o*), but now appointed by the Standing Joint Committee of the county council and the quarter sessions under 51 & 52 Vict. c. 41, s. 83. He should be an able person, learned and instructed in the laws of the realm; and by 1 W. & M. c. 21, s. 4, is to be an able and sufficient person residing in the county, riding, division or other place for which he is appointed. He is to execute his office in person, "or by his sufficient deputy, instructed in the laws of the realm, so that the same deputy be admitted, taken, and reputed, by the said *custos rotulorum*, to be sufficient and able to exercise, occupy, keep and enjoy the same office of clerkship of the peace"(*p*).

Qualification
of.

Office not to
be sold or
purchased.

With reference to clerks of the peace appointed since the Local Government Act, 1888 (51 & 52 Vict. c. 41), came into operation, the appointment of deputy clerk of the peace is now vested in the Standing Joint Committee of the county council and the quarter sessions, sect. 83 (4) of that Act providing as follows:—"The Joint Committee may appoint a deputy clerk to hold office during their pleasure, and to act in lieu of such clerk in case of his death, illness, or absence, or in such other cases as may be determined by the Joint Committee, and wherever the deputy so acts, all things authorized or required to be done by, to, or before the clerk of the peace . . . may be done by, to, or before any such deputy, without prejudice to the appointment of a deputy clerk for the purpose of a second court on the division of the court of quarter sessions for judicial business."

But by sect. 118 (1), clerks of the peace appointed before that Act came into operation hold their offices by the same tenure and have the same power of appointing and acting by a deputy as theretofore(*q*).

(*n*) *Per* Vaughan, B., *Harding v. Pollock* (1829), 6 Bing. 67, citing Year Book, 2 Hen. 7, p. 31, pl. 2. See also *R. v. Justices of Middlesex* (1834), 5 B. & Ad. 1113.

(*o*) See *Harding v. Pollock*, *sup.*; *Harcourt v. Fox* (1693), 1 Show. 530.

(*p*) 37 Hen. 8, c. 1, s. 3; 1 W. & M. c. 21, s. 4.

(*q*) Sect. 118 of the Act contains certain special provisions with refer-

By the Recorders, Magistrates and Clerks of the Peace Act, 1888 (51 & 52 Vict. c. 23), if at any time it appears to the authority having power to appoint . . . a clerk of the peace for any place or county, that the . . . clerk of the peace for that place or county is, by reason of illness, absence, or any other cause, incapable of appointing or removing a deputy, the authority may exercise that power on his behalf, and in so doing may assign out of his salary or stipend a suitable remuneration to any deputy so appointed. The deputy so appointed has all the powers and privileges of the clerk of the peace for whom he is so appointed to act.

It is enacted by 1 W. & M. c. 21, s. 7, that "It shall not be lawful for any [*custos rotulorum* or other] person to whom of right it doth or shall belong to nominate, elect, or appoint any clerk of the peace, to sell the said place of clerk of the peace or to take any bond or other assurance to receive or have any reward, money, fee, or profit, directly or indirectly, to him or any other person for such nominating, electing, or appointing; but every such [*custos rotulorum* or other] person that shall so sell the clerkship of the peace, and every clerk of the peace who shall so buy his place, are hereby disabled to hold their places of [*custos rotulorum* or] clerkship of the peace, and shall also each of them respectively forfeit double the sum or value or other thing that shall be so given or taken to be recovered by him or them to their own use that shall sue for the same to be prosecuted by" [action in the High Court of Justice].

The clerk of the peace of the county cannot hold the office of clerk to the justices of a borough within the county (*qq*).

Before the Local Government Act, 1888 (51 & 52 Vict. c. 41), came into operation, the office of the clerk was "so long as he shall well demean himself in his said office" (*r*); and, therefore, he had an estate of freehold for life in the office, on condition of behaving well; so that he could not be dispossessed, except for misbehaviour, and by a competent tribunal; nor did his estate determine by the death or removal of the *custos*. He could be appointed for no other term; and, therefore, an appointment during pleasure was void, and the party so appointed no clerk of the peace (*s*).

But now, by the Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 83), clerks of the peace appointed since that Act came into operation may be removed by the Standing Joint Committee, and therefore hold their office at the pleasure of such committee.

ence to persons who were, on the Act coming into operation, clerks of the peace for Sussex, Suffolk, Lancaster, Middlesex, Surrey, and clerks of the gaol sessions in Yorkshire and Lincolnshire.

(*qq*) 45 & 46 Vict. c. 50, s. 159 (2).

(*r*) 1 W. & M. c. 21, s. 4.

(*s*) *Harcourt v. Fox* (1693), 1 Show. 530; *R. v. Owen* (1694), 4 Mod. 293.

Clerks of the peace, however, who were holding office at the time when that Act came into operation are only removable in accordance with the former law.

Declaration
on entering
office.

On entering upon his office, the clerk of the peace is no longer required to take the oaths of allegiance, supremacy and abjuration, or any other oath (*t*), but must make a declaration to the following effect (*u*):—

I, A. B., declare, that I have not paid nor will pay any sum or sums of money, or other reward whatsoever, nor have given nor will give any bond or other insurance to pay any money, fee or profit, directly or indirectly, to any person or persons whomsoever, for such nomination and appointment. So help me God.

Dismissal
from office.

As to clerks of the peace who are still subject to the old law, if the clerk of the peace “misdemean himself in the execution of the said office,” and a complaint and charge in writing of such misdemeanor shall be exhibited against him to the court of quarter session, such court, on due examination and proof openly heard before them, may suspend or discharge him (*x*). Extortion is one of the offences for which this power of the sessions may be exerted (*y*). The word misdemeanor in the above section is not confined to a criminal offence, but means any improper conduct; such as gross negligence, or acts of omission or commission in his office; therefore, an absolute and contumacious refusal to enter an order of the court is a ground for removal (*z*). The order of sessions, removing a party so charged, need not set forth the evidence on which it is founded (*a*). Previous to the statute 27 & 28 Vict. c. 65, cases had occurred in which clerks of the peace had been guilty of such misconduct as to render them unfit to hold their offices, but the justices had been unable to remove them, by reason that such misconduct did not occur in the execution of their office; therefore, by that statute, if it appear to any two justices of the peace of a county, &c., that the clerk of the peace of that county, &c., has been guilty of such misconduct otherwise than in the execution of his office, as in the opinion of the said justices to render him an unfit or improper person to hold the office of clerk of the peace, the said justices may exhibit against him to the court of general or quarter sessions of the county, &c., complaint in writing stating the misconduct of which the clerk has been guilty, a copy of which shall at the same time be sent to the *custos rotulorum*, and it shall be lawful for the said court, if satisfied upon due examination in open court that the clerk complained of has been guilty of the

Guilty of mis-
conduct
otherwise
than in the
execution of
his office.

(*t*) 31 & 32 Vict. c. 72, s. 9.

(*u*) 1 W. & M. c. 21, s. 9; 31 & 32 Vict. c. 72, s. 12 (*4*).

(*x*) 1 W. & M. c. 21, s. 6. See *R. v. Lloyd* (1734), 2 Stra. 996, where the form of dismissal is given.

(*y*) *R. v. Baines* (1705), 6 Mod. 192.

(*z*) *Wildes v. Russell* (1866), L. R. 1 C. P. 722, 738.

(*a*) *R. v. Lloyd*, *sup.*

misconduct imputed to him, and that the same is such as to render him an unfit or improper person to hold his office, to suspend or remove him from his office, and a new clerk of the peace shall be appointed.

By sect. 3, if the clerk of the peace feels aggrieved by the decision of the court he may appeal within three months to the Lord Chancellor by motion in a summary manner.

The word county includes riding, division or liberty of a county, or any city, borough or other place having a separate court of quarter sessions.

The clerk of the peace, by himself or his sufficient deputy, must be in constant attendance on the court of quarter sessions. He gives notice of its being holden or adjourned; issues its processes; records its proceedings; and does all the ministerial acts necessary to give effect to its decisions. It is his duty, when prosecutors do not choose to seek professional assistance elsewhere, to draw the bills of indictment. He has also been said to be amerciable in the Court of King's Bench for gross errors in indictments framed by him, and brought before that court on *certiorari* (*b*); and though, perhaps, at the present day he would scarcely be held responsible for mere error, there is no doubt that if an indictment drawn by him were of immoderate and oppressive length, it might be referred to the master, upon whose report he might be ordered to pay the costs of such parts of it as should be found manifestly superfluous (*c*).

His duties in connection with the sessions.

In the actual course of the sessions, it is the duty of the clerk of the peace, as officer of the court, to read such matters as are by statute, *e.g.* the certificate of justices upon the diversion or stopping up of highways (*d*), directed to be read in sessions, as well as documents proved in evidence; to call over and swear all jurors, and make known their defaults and excuses to the court (*e*); to call the parties under recognizance, whether to prosecute, plead, or give evidence; to present the bills to, and receive them from, the grand jury; to arraign prisoners; to receive and record verdicts; to administer all oaths for the justices, though this duty is usually performed by the crier; and make true entries of all proceedings (*f*).

Duties of the office in connection with quarter sessions.

The clerks of the peace might previous to the Local Government Act, 1888, have been made the trustees of lands purchased or hired by the justices of the county for public purposes (*g*).

As to his duties in summoning juries, and upon fines being imposed on jurors for non-attendance in boroughs, see *post*,

(*b*) Lilly's Praet. Reg. 71.

(*c*) *R. v. May* (1779), 1 Dougl. 193, 191.

(*d*) 5 & 6 Will. 4, c. 50, s. 85.

(*e*) See 25 & 26 Vict. c. 107, s. 12.

(*f*) *Wildes v. Russell*, *ubi sup.*

(*g*) See 21 & 22 Vict. c. 92, extended by 34 Vict. c. 14.

p. 99; and in respect of highways, see the Highway Acts, and *post*.

He has also a variety of other duties imposed upon him by several Acts of Parliament (*h*).

For his duties on a division of the court of quarter sessions, see 21 & 22 Vict. c. 73, s. 11, *post*, Chap. V. Sect. 2 (*i*).

Taxation of
costs.
Duties of the
office.

Costs are taxed by the clerk of the peace, as the officer and in aid of the court, who, however, must adopt his taxation, which he must report to them before the close of the sessions (*k*). His taxation should therefore be completed before the final close of the sessions, unless the parties consent to the taxation being proceeded with out of court (*l*).

The clerk of the peace is no longer prohibited from practising as an attorney since the 6 & 7 Vict. c. 73, repealing 22 Geo. 2, c. 46, s. 14.

Appointment
of, in cities,
boroughs, &c.

In a borough within the Municipal Corporations Act (45 & 46 Vict. c. 50), the council of a borough, which has obtained a grant of separate quarter sessions, shall appoint a fit person to be clerk of the peace, and such clerk shall hold office during his good behaviour (s. 164).

The clerk of the peace of a borough may not hold the appointment of clerk to the justices of the borough (*m*).

The clerk of the peace in a borough is the officer of the court of quarter sessions of the borough, while the town clerk is the officer of the council, holding office during the pleasure of the council (*n*).

Appointment
of deputy.

The clerk of the peace in a borough may from time to time, by writing signed by him, appoint a fit person to act as deputy for him, in case of his illness, incapacity or absence, and the appointment must be signified in writing, signed by

(*h*) By 7 & 8 Vict. c. 101, s. 39, "on application of any overseer, or of any board of guardians, or of any attorney at law, it shall be the duty of the clerk of the peace of the county or place, or his deputy, if thereunto required, to tax any bill due to any solicitor or attorney in respect of business performed on behalf of any parish or union situate wholly or in part within such county or place; and the allowance of any sum on such taxation shall be *prima facie* evidence of the reasonableness of the amount, but not of the legality of the charge, and the clerk of the peace shall be allowed for such taxation after the rate to be fixed from time to time by the master of the crown office, and declared by an order of the poor law commissioners; and if any such bill be not taxed before it is presented to the auditor, the auditor's decision on the reasonableness as well as the legality of the charges shall be final."

(*i*) See also *Wilde v. Morris* (1852), 22 L. J. M. C. 4.

(*k*) *Ex parte Holloway* (1831), 1 Dowl. P. C. 26; *Reg. v. Long* (1841), 1 Q. B. 740; *Selwood v. Mount* (1841), 10 L. J. M. C. 121.

(*l*) *Rawnsley v. Hutchinson* (1871), L. R. 6 Q. B. 305; *Frecman v. Read* (1860), 30 L. J. M. C. 123. See *post*, Part III. Chap. I. on Appeals. And now by sect. 20 of the Licensing Act, 1902 (2 Edw. 7, c. 28), the costs of the justices given under that section may be taxed either in or out of sessions.

(*m*) 24 & 25 Vict. c. 75, s. 5.

(*n*) 45 & 46 Vict. c. 50, s. 17. See *R. v. Carmarthen* (1838), 7 A. & E. 756.

the clerk of the peace, to the council, and must be recorded in their minutes (*o*).

In case of the inability of the clerk of the peace for a borough to appoint a deputy, by reason of illness, absence or other cause, a deputy may be appointed by the council of the borough on his behalf under the Recorders, Magistrates and Clerks of the Peace Act, 1888 (51 & 52 Vict. c. 23).

By the Levy of Fines Act, 1822 (3 Geo. 4, c. 46), certain duties in connection with the levying and return of fines, penalties, forfeitures and estreated recognizances in boroughs were imposed upon town clerks, but all such duties were transferred to the clerks of the peace of boroughs having separate quarter sessions by 20 & 21 Vict. c. 50, s. 5.

As in counties the removal of a clerk of the peace from his office for misbehaviour was formerly in the hands of the court of quarter sessions under 1 W. & M. c. 21, so in boroughs, having quarter sessions under 45 & 46 Vict. c. 50, it is within the jurisdiction of the recorder and not of the town council (*p*).

Removal of clerk of the peace in boroughs.

The right of clerks of the peace previous to 57 Geo. 3, c. 91 to take fees is enveloped in obscurity. No general statutory right to fees existed. They could not be claimed by prescription, for the office of clerk of the peace was created within time of legal memory, and there would seem to be no sufficient reason for clerks of the peace being exempt from the provision of the statute of Westminster I. (3 Edw. 1, c. 26): "That no sheriff, nor other the King's officer, take any reward to do his office, but shall be paid of that which they take of the King; and he that so doth shall yield twice as much, and shall be punished at the King's pleasure." For, according to Sir Edward Coke's reading of the statute (2 Inst. 209), under the words *ne autre minister le roy* "are understood escheators, coroners, bailiffes, gaolers, the King's clerk of the market, aulnager and other inferior ministers and officers of the King, whose offices do anyway concern the administration or execution of justice, or the common good of the subject, or for the King's service; that none of the King's officers or ministers do take any reward for any matter touching their offices, but of the King." The statute 12 Rich. 2, c. 10 enacted that every of the said justices (*i.e.* at quarter sessions) should take for their wages four shillings the day for the time of their said sessions, and their clerk two shillings [a day] of the fines and amerciements rising and coming of the same sessions, by the hands of the sheriffs, and clerks of the peace were thus not left in the predicament of having either to obtain fees from parties or go without remuneration altogether.

In counties — his fees.

Moreover, Sir Edward Coke, in his comments on chapter 10

(*o*) 45 & 46 Vict. c. 50, s. 164 (3) (4).

(*p*) *Reg. v. Hayward* (1862), 31 L. J. M. C. 177.

of the statute of Westminster I. (2 Inst. 176) as to coroners, says: "And this was the ancient law of England, that none having any office concerning administration of justice should take any fee or reward of any subject for the doing of his office, to the end that he might be free and at liberty to do justice, and not to be fettered with golden fees, as fetters to the suppression or subversion of truth and justice."

The legality of fees being taken in certain cases seems to have been recognised by 55 Geo. 3, c. 50, ss. 4, 5, for that statute recites that "it is customary for clerks of the assize, clerks of the peace and other officers to demand and take from persons indicted divers sums in the way of fees," and abolishes the payment of fees by persons charged with felony or misdemeanor against whom no bill should be found, or who should be acquitted. In Burn's Justice it is stated (3 Burn's Just. 213) that "the fees in sessions for traversing, trying or discharging indictments, discharging recognizances and the like, do vary according to the different customs in different places," so that no uniform custom to pay fees could have been pointed to. It was laid down in *Fleetwood v. Finch* (1793) (2 H. Bl. 222) that "no officer can claim a fee except by ancient usage or Act of Parliament," and the only conclusion to be drawn upon the matter would seem to be that the right of a clerk of the peace before 57 Geo. 3, c. 91 to demand any particular fee not given by statute must have been rested upon the "ancient usage" of his particular court, and whether he could have made good his claim may be considered doubtful.

Table of fees
in counties
and boroughs.

By 57 Geo. 3, c. 91 the fees of the clerk of the peace were to be "ascertained," and a table expressing them arranged by the court of quarter sessions, and submitted to the approval of the next court of quarter sessions, and finally to the judges of assize for their sanction, and no greater or other fees could be taken than those set forth in such table; and now, by 11 & 12 Vict. c. 43, s. 30, superseding and replacing 57 Geo. 3, c. 91, the fees to which any clerk of the peace shall be entitled shall be ascertained, appointed and regulated in manner following: (that is to say) the justices of the peace at their quarter sessions for the several counties, ridings, divisions of counties and liberties throughout England and Wales, and the council or other governing body of every borough in England and Wales, shall from time to time, as they shall see fit, respectively make tables of the fees which, in their opinion, should be paid to the clerks of the peace within their several jurisdictions; and which said tables respectively, being signed by the chairman of every such court of quarter sessions, or by the mayor or other head officer of any such borough respectively, shall be laid before his Majesty's principal secretary of state. And it shall be lawful for such secretary of state, if he thinks fit, to alter such table or tables of fees, and to subscribe a certificate or declaration

that such fees are proper to be demanded and received by the several clerks of the peace throughout England and Wales. And such secretary of state shall cause copies of such tables or sets of tables of fees to be transmitted to the several clerks of the peace throughout England and Wales. And if, after such copy shall be received by such clerks or clerk, he or they shall demand or receive any other or greater fee or gratuity for any business or act transacted or done by him as such clerk than such as is set down in such table or set of tables, he shall forfeit for every such demand the sum of 20*l.*, to be recovered by action of debt in any of the superior courts of law at Westminster by any person who will sue for the same.

The foregoing section replaces sects. 1 and 2 of 57 Geo. 3, c. 91, and it is submitted that sects. 3 and 4 of that statute, which are not repealed, apply to and are to be read with that section, in the same manner as if that section had been declared in express terms to be substituted to all intents, and for all purposes, for sects. 1 and 2 of the earlier statute.

Sects. 3 and 4 of 57 Geo. 3, c. 91, are as follows :—(Sect. 3.) Every table of fees and allowances which shall be made, approved, ratified, and confirmed from time to time as aforesaid, shall be deposited with the clerk of the peace for the county or place for which such table of fees shall have been so made, approved, ratified, and confirmed as aforesaid; and a true and exact written or printed copy or copies thereof shall be placed and constantly kept in a conspicuous part of every room or place wherein any general or quarter sessions of the peace for such county or place shall be held; and if any clerk of the peace, or person acting as such, shall at any time neglect to cause every such copy to be so placed and constantly kept according to the provisions of this Act, he shall forfeit and pay to any person who shall sue for the same, for every such offence, the sum of five pounds, to be recovered by action or information in any of his Majesty's courts of record at Westminster.

(Sect. 4.) All suits and actions, which shall be brought or commenced by virtue of this Act, shall be brought before the end of three calendar months after the offence committed, and not otherwise.

It would seem that the authority conferred upon quarter sessions, and upon the judges of assize as the confirming authority, by 57 Geo. 3, c. 91, was not an authority to prescribe the payment of fees in cases where fees had theretofore not been payable, but was an authority to ascertain the fees which had legally been payable, and to prescribe those which for the future should be paid. But those which were to be paid for the future were required to be fees to which the party had been liable, before the exercise of the authority by the making of the table of fees. This was laid down in *Reg. v. Coles* (1845) (8 Q. B. 75), but was not actually decided in that case, inasmuch as the court proceeded upon the

assumption that the fees prescribed by the quarter sessions were warranted by prior law and usage. The language of sect. 30 of 11 & 12 Vict. c. 43 is not identical with that of sect. 1 of 57 Geo. 3, c. 91, and it is submitted that whatever might have been the true construction to be placed on 57 Geo. 3, c. 91, s. 1, the court would not go behind a table of fees duly appointed to be paid pursuant to 11 & 12 Vict. c. 43, s. 30.

Upon the forfeiture clause of the 57 Geo. 3, c. 91, s. 2, a clerk of the peace who took a larger fee than allowed by the table, under a mistake as to the existence of the facts upon which he made the charge, was held not to be guilty of the offence or to have incurred the forfeiture, if he, reasonably believing that there were two sureties to a recognizance, received a fee as for taking recognizances for a principal and two sureties instead of one surety only, as the fact was,—for the maxim *Actus non facit reum, nisi mens sit rea*, applies in such case (*q*).

Fees of, in
boroughs.

By the Municipal Corporation Act, 1835 (5 & 6 W. 4, c. 76), s. 124, the council of every borough, having a separate court of quarter sessions, was empowered and required to make and settle a table of the fees to be taken by the clerk of the peace, and such table of fees was to be submitted to the secretary of state, and where such table of fees was confirmed and allowed by the secretary of state, either as such table had been transmitted to him, or with such alterations, additions, or abatements as he might think proper, the fees therein mentioned might thenceforth be lawfully taken by the clerk of the peace.

By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 164 (5), “where a table of fees to be taken by the clerk of the peace has been made by the council and confirmed by the secretary of state” (*i.e.*, under the Act of 1835), “and is for the time being in force, the clerk of the peace, if paid by fees, may take the fees to which he appears by that table to be entitled,” and, by sub-sect. 6 of the same section, “The council may from time to time make a new table of the fees to be taken by the clerk of the peace, but shall submit every such table to the secretary of state for confirmation, and he may confirm and allow the same, either as submitted, or with such alterations, additions, or abatements, as he thinks proper, and any such table shall be of no validity until it is so confirmed.”

By sect. 234 of the same Act, “The town clerk of every borough shall cause a true copy of the tables of fees for the time being authorised to be taken by the clerk of the peace (if any) for the borough, by the clerk to the justices (if any) for the borough, and by the registrar and officers of the

borough civil court (if any) to be posted conspicuously in the following places: (a) The room where the business of the town clerk's office is transacted; (b) the room, if any, where the justices of the borough sit for transacting their business; (c) the room, if any, where the court of quarter sessions of the borough is held; and (d) the room, if any, where the borough civil court is held."

And by 14 & 15 Vict. c. 55, s. 9, the justices of the peace at general or quarter sessions for the several counties, ridings, divisions of counties and liberties throughout England and Wales, and the council or other governing body in every borough in England and Wales from time to time, may recommend to one of her Majesty's principal secretaries of state that the clerks of the peace, within their several jurisdictions, be paid by salaries in lieu of fees and other payments, or may recommend that the amounts of all or any of the salaries for the time being payable be reconsidered, and where payment by salaries in lieu of fees, or the reconsideration of the amounts of any salaries, is recommended, to state the amount of the salaries which, in the opinion of such justices, council, or governing body, should in each case be paid; and every such recommendation being signed by the chairman of the court of general or quarter sessions, or the mayor or other head officer of the borough, shall be transmitted to the secretary of state; and it shall be lawful for such secretary of state when any such recommendation is so made to him by order under his hand, if he so think fit, to direct that all or any of the clerks to which such recommendation refers be paid by salary, and to fix the amount of salary to be so paid, or vary the amount of salary for the time being payable to any such clerk; and such secretary of state shall cause copies of every order made under this enactment, affecting any clerk of the peace, to be transmitted to such clerk of the peace; and the salary for the time being payable to any such clerk under any such order shall be paid out of any county rate, or rate in the nature of a county rate, made in the county, riding, division or liberty, or out of the borough fund of the borough, as the case may be, for or in which such clerk of the peace is appointed or acts, &c.

Payment by salary instead of fees in counties and boroughs.

Then follow provisions as to the basis for fixing the amount of the salary and in respect of compensation.

It is only by statute that the clerks of the peace can be paid by salary instead of fees; and, therefore, an agreement between a clerk of the peace in a municipal borough and the town council that he will take a certain sum by way of annual salary, instead of the fees attached to his office, and account for the surplus of the fees to the council, is void on the ground of public policy (r).

(r) *Corporation of Liverpool v. Wright* (1859), 28 L. J. Chan. 868.

* It is competent, also, for the court of sessions or council to recommend that certain work, which the clerk of the peace might be called upon to do by reason of his office, should be paid for by fees or otherwise irrespective of his salary (*s*).

After the salary is fixed and ordered to be paid, all fees, &c. are to be paid by the clerk of the peace of the county to the treasurer in aid of the county rate, or rate in the nature of the county rate, or in boroughs to the treasurer of the borough fund (*t*).

And justices are authorized to remit fees which the clerks shall be discharged from accounting for (*u*).

Fees under
18 & 19 Vict.
c. 126.

As the fees and emoluments of clerks of the peace in counties and boroughs in criminal proceedings were seriously diminished by the passing of the Criminal Justice Act, 1855 (18 & 19 Vict. c. 126), it was provided by sect. 18 of that Act that an average of the fees in criminal proceedings should be ascertained for the five years before that Act by the commissioners of the treasury; and any deficiency between the amount so ascertained and the amount of the receipts in any one year afterwards should be paid to the clerk out of the consolidated fund, or, if he were paid by salary, to the treasurer of the county or borough in aid of the county or borough rate.

Fees for
making
certificates
of expenses
of prisoners'
witnesses.

And afterwards, when by the Criminal Law Amendment Act, 1867 (30 & 31 Vict. c. 35), s. 5, prisoners were entitled to have the expenses of witnesses called for them allowed, and additional trouble was imposed upon clerks of the peace in making out certificates for their expenses, they were by such Act to be allowed 6*d*. for each witness; but where he is paid by salary, or under a table of fees which allows only one fee of a fixed amount in respect of his several duties relating to the prosecution of an offender, he is not to take this fee (*x*). And where he may take the fee, he is to include it in every return or account of fees during any one year under the 18 & 19 Vict. c. 126, s. 18, *supra*.

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 83, subject to the provisions of sect. 118, with reference to clerks of the peace who held office at the time when the Act came into operation, "The council shall pay to the clerk of the peace in respect of his services as clerk of the peace and as clerk of the county council such salary as may be from time to time fixed under the enactments relating thereto, and all fees and costs payable to the clerk of the peace which are not excluded when the salary of the clerk of the peace is fixed shall be paid to the county fund, and for the purpose

(*s*) 14 & 15 Vict. c. 55, s. 10.

(*t*) *Ibid.* s. 11.

(*u*) *Ibid.* s. 12.

(*x*) 32 & 33 Vict. c. 89, s. 10.

of the enactments relating to such salaries and fees the standing joint committee of the county council and the quarter sessions shall be substituted for the quarter sessions and the local authority respectively." (Sub-sect. 5.)

In boroughs where the clerk of the peace is paid by salary such salary is payable out of the borough fund without order of the council (*y*). But where he is paid by fees, such fees are not payable out of the borough fund without such order (*z*).

There is no doubt that if a clerk of the peace wilfully take fees that are not due, under colour of his office, he will be liable to be indicted for extortion at common law, or to be removed from his office. It is said that he is not bound "to enter judgment or the like, at the suit of any," without receiving his legal fee for the same; but he is compellable to enter, without previous fee, whatever the court shall order *without* the suit of another (*a*); and it may now be taken that he is bound to enter whatever they, on reference to them, shall absolutely command. The sessions cannot compel payment of his fees by summary process, or detain parties till they are paid, but he must seek his remedy by action (*b*). Where the clerk of the peace is entitled to have from the county treasurer such fees as have been usually paid, and he is lawfully entitled to receive, a long disuse of the right to receive them, viz., during forty-five years, will not affect the right (*c*). Extortion.

Fees taken from prisoners have now been abolished. Since the 55 Geo. 3, c. 50, by which every prisoner charged with felony, or being accessory thereto, or misdemeanor, against whom no bill is found, or who on trial is acquitted, or who shall be discharged by proclamation for want of prosecution, is to be immediately set at large without payment of any fee to any person whatsoever; and by the 5th section the fees usually paid to the clerk of the peace were abolished, and by the 9th section it is made a misdemeanor to exact any such fees; and by the 8 & 9 Vict. c. 114, it shall not be lawful to demand or take from any such prisoner any fee for their appearance to the indictment or information, or for allowing them to plead thereto, or for recording their appearance or plea, or discharging any recognizance taken, or any surety or sureties for them. Abolition of fees from prisoners.

The duties of the clerk of the peace with respect to fines and forfeitures are now mainly regulated by the Levy of Fines Act, 1822 (3 Geo. 4, c. 46). Duties as to fines and estreats.

By sect. 2 of that Act (as amended by 20 & 21 Vict. c. 50,

(*y*) 45 & 46 Vict. c. 50, 5th Sched. Part I.

(*z*) *Ibid.* 5th Sched. Part II.

(*a*) Crompt. 159.

(*b*) *Pollard v. Gerard* (1701), 1 Ld. Raym. 703; *R. v. Bury* (1779), 1 Leach, C. C. 201.

(*c*) *R. v. Baker* (1837), 7 A. & E. 502, turning on 5 Geo. 4, c. 84, s. 21, and 55 Geo. 3, c. 156, s. 2.

s. 5), "all fines, issues, amerciaments, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them" (except where otherwise specially directed by Act of Parliament), which should be "set, imposed, lost or forfeited" by or before any justice or justices of the peace out of sessions, were required to be certified by such justice or justices to the clerk of the peace, in writing, containing the prescribed particulars, signed by such justice or justices, on or before the ensuing general or quarter sessions, in order that such fines, &c. &c. should be levied along with fines, &c. imposed by the quarter sessions. But fines imposed by the courts of summary jurisdiction are now levied by such courts and accounted for in manner provided by the Summary Jurisdiction Acts; and by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 9:—(1.) Courts of summary jurisdiction are empowered to forfeit and enforce all recognizances conditioned for the appearance of persons before such courts, or for their doing any other matters or things to be done in, to, or before such courts, or in any proceedings in such courts, and with reference to recognizances conditioned to keep the peace or to be of good behaviour, or not to do or commit some act or thing. The same Act enacts as follows:—

(2.) "Where a recognizance conditioned to keep the peace or to be of good behaviour, or not to do or commit some act or thing, has been entered into by any person as principal or surety before a court of summary jurisdiction, that court or any other court of summary jurisdiction acting for the same county, borough, or place, upon proof of the conviction of the person bound as principal by such recognizance of any offence which is in law a breach of the condition of the same, may by conviction adjudge such recognizance to be forfeited, and adjudge the persons bound thereby, whether as principal or sureties, or any of such persons, to pay the sums for which they are respectively bound."

(3.) "Except where a person seeking to put in force a recognizance to keep the peace or to be of good behaviour, by notice in writing, requires such recognizance to be transmitted to a court of general or quarter sessions, the recognizances to which this section applies shall be dealt with in manner in this section mentioned, and, notwithstanding any enactment to the contrary, shall not be transmitted, nor shall the forfeiture be certified, to general or quarter sessions."

Although, therefore, the duties of clerks of the peace under 3 Geo. 4, c. 46, with reference to recognizances to keep the peace and to be of good behaviour, entered into before courts of summary jurisdiction, have not been altogether taken away, the occasion for their exercise will not often arise, whilst so far as concerns recognizances entered into before such courts of the kinds mentioned in sect. 9, sub-sect. (1), of the Sum-

mary Jurisdiction Act, 1879, their duties have altogether ceased.

The duties of clerks of the peace with reference to such recognizances entered into before courts of summary jurisdiction as may still be transmitted to courts of general or quarter sessions under sect. 9, sub-sect. (3), of the last-mentioned Act, and their duties with reference to such "fines, issues, amerciaments, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them imposed or forfeited" at sessions, are set forth in 3 Geo. 4, c. 46, which (as amended by 20 & 21 Vict. c. 50, s. 5) enacts as follows:—

Sect. 2. "Such clerk of the peace shall copy on a roll such . . . forfeited recognizances" (*i.e.*, forfeited recognizances taken before courts of summary jurisdiction and transmitted to sessions), "sum or sums of money paid or to be paid in lieu or satisfaction of them, together with all fines, issues, amerciaments, forfeited recognizances, sum or sums of money paid or to be paid in lieu or satisfaction of them or any of them, imposed or forfeited at such court of general or quarter sessions, and shall, within such time as shall be fixed and determined by such court, not exceeding twenty-one days after the adjournment of such court, send a copy of such roll, with a writ of *distringas* and *capias*, or *fiere facias* and *capias* [according to the form and effect in the schedule to 22 & 23 Vict. c. 21] to the sheriff of such county, or the sheriff, bailiff, or officer of such city, borough, or place having execution of process therein respectively, as the case may be; which shall be the authority to such sheriff of such county, or the sheriff, bailiff, or officer, as the case may be, for proceeding to the immediate levying and recovering of such fines, issues, amerciaments, forfeited recognizances, sum or sums of money, &c. on the goods and chattels of such several persons, or for taking into custody the bodies of such persons, in case sufficient goods and chattels shall not be found whereon distress can be made for recovery thereof; and every person so taken shall be lodged in the common gaol until the next general or quarter sessions of the peace, there to abide the judgment of the said court."

The sheriff is not to act on this roll of fines and levy the amount thereof if he has received the fine within the twenty-one days. Duty as to fines and estreats.

It is an imperative duty on the part of the clerk of the peace to make up this roll (*d*); and he is liable to an action for negligently and carelessly making up the roll, so as to include the name of a party, who has paid a fine imposed at the sessions to the clerk of the peace or his servant, as being

(*d*) See *per* Lord Denman, C. J., *R. v. Justices of the West Riding* (1835), 7 A. & E. 591.

an unpaid fine, whereby the sheriff, acting upon the correctness of the roll, executed the writ accompanying the roll and imprisoned the party (*e*). And according to Coleridge, J.,—“If the clerk of the peace has received a sum of money in respect of a fine, and has omitted to state that in his return, and the sheriff not knowing anything about it has the roll given to him and levies, or even if the circumstances be such that the sheriff may not be entirely free from negligence because he has failed to make some inquiries, or, what is a stronger case, has had the amount of the fine handed over to him, still I think there would be a breach of duty in the clerk of the peace. It would be no defence in him to show that another officer had also been guilty of negligence” (*e*).

Under the statutes authorising the appointment of a deputy clerk of the peace, it would be the duty of such deputy to receive fines, &c. imposed at sessions, so as to make a payment to such deputy a payment to the clerk of the peace (*e*).

With respect to the duties of the clerk of the peace in regard to fines of jurors and witnesses, certified to him by the coroner of counties, and as to recognizances forfeited at any coroner's inquest under the Coroners Act, 1887 (50 & 51 Vict. c. 71), s. 19, see *post*, p. 73.

If he should discharge or conceal any indictment or any fine or forfeiture, unless by order of court, he is, by the 22 & 23 Car. 2, c. 22, s. 5, liable to forfeit treble value, half to the king, and half to him that shall sue, to lose his office, and be incapacitated ever to hold any office connected with the revenue; and a neglect of duty imposed by the 3 Geo. 4, c. 46, is punishable by a penalty of 50*l*. (sect. 10).

The sheriff is to return the writ or roll to the following sessions, with a statement of what he has done to levy the sums which it describes as due; and his return, with a duplicate of the roll, and a certificate by the sessions that the sheriff's duty has been performed, is to be returned by the clerk of the peace to the lords of the treasury (*f*). Besides the fees on forfeited recognizances, the clerk of the peace is entitled to an allowance of sixpence for every hundred words for all copies of the roll so transmitted to the sheriff. For any neglect of the duty so imposed he is liable to forfeit 50*l*., to be recovered with costs by any one who will sue in any of the courts at Westminster (*g*). And within twenty days from the opening of the sessions he has to send to the treasury a copy of the sheriff's roll as delivered by him to the sessions (*h*).

Fees on forfeited recognizances.

(*e*) *Wildes v. Morris* (1852), 22 L. J. M. C. 4.

(*f*) 3 Geo. 4, c. 46, s. 8.

(*g*) 3 Geo. 4, c. 46, s. 10. See *post*, *Forfeiture of Recognizances and Estreats*.

(*h*) 4 Geo. 4, c. 37, s. 5.

By 4 W. & M. c. 24, s. 4, "All clerks of the peace and others to whom it belongeth to make returns of estreats into the court of exchequer shall upon delivery in of all and every such estreat and estreats take the oath following, that is to say"—

You shall swear that these estreats now by you delivered are truly and carefully made up and examined, and that all fines, issues, amerciaements, recognizances and forfeitures which were set, lost, imposed or forfeited and in right and due course of law ought to be estreated in the court of exchequer are to the best of your knowledge and understanding therein contained, and that in the same estreats are also contained and expressed all such fines as have been paid into court from which the said estreats are made without any wilful or fraudulent discharge, omission, misnomer or defect whatsoever.

So help you God.

The oath which was formerly required to be taken before a baron of the exchequer (*i*), or commissioners specially appointed for the purpose (*k*), may now be taken before a commissioner for oaths (*l*).

The court of exchequer had no jurisdiction over recognizances forfeited at quarter sessions, if not estreated, though the yearly certificate of them had been delivered into the exchequer under 3 Geo. 4, c. 46, s. 14 (*repealed*) (*m*), and only the quarter sessions could relieve (*n*). It is conceived that this is still the law.

The revenue side of the court of exchequer is now represented by the revenue side of the King's Bench Division.

A clerk of the peace must receive and keep documents directed by the standing orders of parliament (*o*), or by inclosure, railway, highway or other Acts, to be deposited with him. The danger to titles from neglect so to enrol inclosure awards made before 28th August, 1833 (*p*), has been met by 3 & 4 Will. 4, c. 87, which by sect. 1 makes them valid, though not enrolled, and permits them to be enrolled *nunc pro tunc*, directing the clerk of the peace or his deputy to make out copies of them when so enrolled at 3*d*. for seventy-two words; which copies, signed as by the Act directed, are made legal evidence as well as the *original* awards.

As to custody of certain documents.

(*i*) 4 W. & M. c. 24, s. 4.

(*k*) *Ex parte Hodgson* (1828), 1 M. & Ry. M. C. 351, n.; except where the amount to be accounted for was less than 5*l*., in which case the return of estreats might have been verified by affidavit: *Ex parte Tomlins* (1831), 2 Tyr. 176.

(*l*) 52 Vict. c. 10, s. 1 (2).

(*m*) *R. v. Thompson* (1832), 3 Tyr. 53; *R. v. Fellow* (1824), 13 Pri. 299; *R. v. Hankins* (1824), McCl. & Y. 27.

(*n*) *Ibid.* See *Haynes v. Hayton* (1827), 7 B. & C. 293; *R. v. West Riding JJ.* (1837), 7 A. & E. 583.

(*o*) 7 Will. 4 & 1 Vict. c. 83; 8 & 9 Vict. c. 16, s. 161.

(*p*) See 41 Geo. 3, c. 109, s. 35.

As to compelling enrolment, see *R. v. Leeds and Liverpool Canal Company* (1840), 11 A. & E. 316.

All writs of *mandamus* and *certiorari* are served upon the clerk of the peace, on behalf of the justices, as their recognised organ; and therefore it is both usual and convenient for the court, when it directs any proceedings to be taken or defended on behalf of the county, and at its charge, to commit the conduct of the case to him, as their attorney, if duly certificated; in which case he is invested with the rights and subject to the responsibility of an attorney acting on behalf of individual clients.

SECTION 5.

OF THE CORONER.

Under the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 5, the appointment of coroners in counties is vested in the county councils. In boroughs they are appointed by the corporation under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 71. There are also certain franchise coroners who stand upon a special footing (*r*). The appointment of deputy coroners both in counties and boroughs is regulated by the Coroners Act, 1892 (55 & 56 Vict. c. 56). Their duties are mainly defined by the Coroners Act, 1887 (50 & 51 Vict. c. 71). Previous to the Municipal Corporations Act, 1882, coroners in boroughs, and, previous to the Local Government Act, 1888, coroners in counties, passed their accounts at quarter sessions, but now they account to the councils of the boroughs and counties respectively.

In counties, divisions and places not being municipal corporations the coroner is stated in the older authorities to be an officer attendant on the court of quarter sessions (*s*); in modern times, however, he does not attend in his official character. He may, however, be called upon to act in the summoning of jurors in case of a challenge to the array, on the ground of un-indifferency in the sheriff, which, if found, would cause the court to award a fresh venire to the coroner (*t*), and may take the sheriff's fees for so acting (*u*). Fines imposed by a coroner on jurors or witnesses making default in their appearance at any inquest before him are certified to the clerk of the peace of the sessions for the county, riding, division or place in which such defaulter shall reside, on or before the first day of the quarter sessions of the peace next ensuing upon the inquest, and a copy of such

Fines by
coroner on
inquest.

(*r*) See as to franchise coroners, 50 & 51 Vict. c. 71, s. 30, and *Jervis on Coroners*, 6th ed. p. 99.

(*s*) *Dalt. Just.* c. 185.

(*t*) *R. v. Dolby* (1823), 2 B. & C. 104.

(*u*) 50 & 51 Vict. c. 71, s. 15.

certificate is to be caused to be served upon the person fined by leaving it at his residence twenty-four hours at the least before the first day of the said quarter sessions. And such fines are to be copied by the clerk of the peace on the rolls on which all fines and forfeitures imposed at such quarter sessions of the peace shall be copied, and the same shall be estreated, levied and applied in like manner and subject to the like powers, provisions and penalties in all respects as if such fine or fines had been part of the fines imposed at such quarter sessions; and where a recognizance is forfeited at an inquest held before a coroner, the coroner is to proceed in like manner as if he had imposed a fine upon the person forfeiting that recognizance (*x*).

SECTION 6.

COUNTY AND BOROUGH TREASURERS.

The county treasurer was formerly appointed by the justices in quarter sessions. His appointment is now vested in the county council under the Local Government Act, 1888 (51 & 52 Vict. c. 41), by whom he is also removeable.

By sect. 66 of that Act, "All costs incurred by the quarter sessions, or the justices out of session of a county, and all costs incurred by any justice, police officer, or constable, in defending any legal proceedings taken against him, in respect of any order made or act done in the execution of his duty as such justice, police officer, or constable, shall, to such amount as may be sanctioned by the standing joint committee of the county council and quarter sessions, and so far as they are not otherwise provided for, be paid out of the county fund of the county, and the council of the county shall provide for such payment accordingly."

By sect. 67, "Any order of a court of quarter sessions, or of any justices or justice out of session, for the payment by the county treasurer of costs in criminal proceedings or of costs under the Act 48 Geo. 3, c. 75, shall be obeyed by the county treasurer in like manner as heretofore, and the county council shall cause the treasurer, or some other person on his behalf, to attend at every court of quarter sessions for the purpose of paying such sums as may be ordered by the court to be so paid" (*y*).

In boroughs under the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), the treasurer is appointed by the council, by whom he is also removeable.

(*x*) 50 & 51 Vict. c. 71, s. 19 (4), (5).

(*y*) The particular instances in which orders may be made by the quarter sessions upon the county treasurer are dealt with under their appropriate headings.

By sect. 169 of that Act, "A municipal corporation of a borough having a separate court of quarter sessions shall be liable to pay the costs and expenses attending the prosecution of any felony committed or supposed to have been committed in the borough, and of any other offence committed or supposed to have been committed in the borough the costs and expenses attending the prosecution whereof are by law payable as in the case of a felony. The account of those costs and expenses shall be ascertained as directed by law, and the order of the court for the payment thereof shall be directed to the treasurer of the borough."

An order for payment of the costs of a prosecution made upon a borough treasurer by a court of competent jurisdiction is conclusive, and will be enforced by mandamus (z).

As to the power of a court of quarter sessions of a county before which a prisoner is tried to make an order for payment of the costs of the prosecution, under 7 Geo. 4, c. 64, upon the treasurer of a borough within that county, upon the ground that the offence was committed in such borough, see sect. 25 of that Act, and *R. v. The Treasurer of Oswestry* (a).

It is submitted that the joint effect of sects. 140 and 169 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), is that the borough treasurer is bound to act upon the order of quarter sessions for payment of costs of a prosecution under 7 Geo. 4, c. 64, without any order for payment being made by the council.

SECTION 7.

OF GAOLERS, KEEPERS OF PRISONS AND OTHER PRISON OFFICERS.

By the Prison Act, 1877 (40 & 41 Vict. c. 21), s. 5, "The control and safe custody of the prisoners in the prisons to which this Act applies (b), also all powers and jurisdiction at common law or by Act of Parliament or by charter vested in or exercisable by prison authorities in relation to prisoners or prisoners within their jurisdiction, shall be transferred to, vested in, and exercised by the secretary of state."

Previous to this Act, by the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 58, all prisoners confined in a prison were deemed to be in the legal custody of the gaoler (c), who had certain

(z) *R. v. Treasurer of Oswestry* (1848), 17 L. J. Q. B. 223.

(a) *Ubi sup.*

(b) *I.e.*, all prisons other than convict prisons or military or naval prisons: 28 & 29 Vict. c. 126, s. 3.

(c) *I.e.*, "the governor, keeper, or other chief officer" of the prison: sect. 4.

duties to perform in respect of them. It was his duty to attend on all courts of quarter session, and to bring before the court all the prisoners in custody who had been committed for trial at quarter sessions, and to take charge of all prisoners sentenced by that court to penal servitude or imprisonment, or otherwise lawfully committed to his custody. All such accustomed duties the gaoler still performs, but in view of the wide language of sect. 5 of the Prison Act, 1877, it would seem to be doubtful whether he is under any direct personal liability to the court or to the law in the matter, or whether he is now responsible only to the secretary of state for the manner in which he performs his duties. If, for example, on the court of quarter sessions being assembled for the trial of prisoners, the gaoler omitted to attend the court or to produce the prisoners in custody awaiting their trial, would he be any longer personally amenable to punishment? Or might he say, "None of the prisoners confined in the county prison are in my custody at all; they are in the custody of the secretary of state, to whom alone I am accountable"?

If full effect is to be given to the language of sect. 5 it may have far-reaching consequences, and possibly a wider effect than was contemplated by the draughtsman. It is submitted that sect. 5 upon its true construction leaves the governor, keeper or other chief officer of a prison as fully amenable to the jurisdiction and control of the High Court of Justice and of the commission of oyer and terminer and gaol delivery and of courts of quarter sessions, as they were before, and until the question is set at rest by decision it is submitted that courts of quarter session may safely act upon this view.

By sect. 62 of the Prison Act, 1865, "The gaoler of every prison shall deliver or cause to be delivered to the judges of assize, and to the justices in quarter sessions, a calendar of all prisoners in custody for trial at such assizes or gaol sessions, in the same way as the sheriff of a county has hitherto been required by law to deliver a calendar of such prisoners when committed to the common gaol of the county; and the sheriff shall no longer be required to deliver or cause to be delivered such calendar."

The management of prisons is now vested in the secretary of state, assisted by the prison commissioners, and the other officers whose appointment is provided for by the Prison Act, 1877. By sect. 13 a visiting committee is to be annually appointed for every prison under the Act, consisting of such number of persons, being justices of the peace, to be appointed at such time and by such court of quarter sessions or such bench or benches of magistrates, as the secretary of state, having regard to the locality of the prison, to the justices theretofore having jurisdiction over such prison, and to the class of prisoners to be confined in such prison, may from time

to time by any general or special rule prescribe, in the following manner, namely, The justices of any county, riding, or liberty of a county, having a separate court of quarter sessions, are to appoint members of a visiting committee, when assembled at such general or quarter sessions as may be prescribed by the secretary of state. The justices of a borough (*d*) are to hold special sessions, at such time as may be prescribed by the secretary of state, for the purpose of appointing any members of a visiting committee they may be required to appoint. The duties of the visiting committee which relate to prison discipline and management are not within the scope of this work. They are defined by the Prison Act, 1877.

By sect. 15 of the Act any justice of the peace having jurisdiction in the place in which a prison is situate, or having jurisdiction in the place where the offence in respect of which any prisoner may be confined was committed, may, when he thinks fit, enter into and examine the condition of such prison and of the prisoners therein, and he may enter any observations he may think fit to make in reference to the condition of the prison or abuses therein in the visitors' book to be kept by the gaoler; and it is the duty of the gaoler to draw the attention of the visiting committee, at their next visit to the prison, to any entries made in the said book. But justices, not being members of the visiting committee, are not entitled, in pursuance of this section, to visit any prisoner under sentence of death, or to communicate with any prisoner, except in reference to the treatment in prison of such prisoner, or to some complaint that such prisoner may make as to such treatment.

By sect. 10 of the Prison Act, 1898 (61 & 62 Vict. c. 41), every prison officer, while acting as such, has, by virtue of his appointment, all the powers, authorities, protection and privileges of a constable.

Amongst other provisions the Prison Acts, 1865 (28 & 29 Vict. c. 126), 1877 (40 & 41 Vict. c. 21), and 1898 (61 & 62 Vict. c. 41), contain provisions relating to custody of prisoners (1865, s. 58); description of prison in writs, &c. (*ibid.* s. 61); removal of prisoners for trial or punishment (*ibid.* s. 63); removal of prisoners in other cases (*ibid.* ss. 64, 65); confinement of prisoners before and during trial (1877, s. 24); confinement of prisoners after conviction (*ibid.* s. 25); legality of commitments, notwithstanding that commitment is made to the wrong prison (*ibid.* s. 27); prisoner when deemed to be in legal custody (*ibid.* s. 28); allowance to discharged prisoners (*ibid.* s. 29). For the other provisions of these Acts, reference should be made to the Acts themselves. The management of prisons is largely regulated by rules made by the secretary of state under the Prison Act, 1898.

(*d*) Except Worcester, where the appointment of the visiting justices is made by the council under the Worcester Prison Act, 1867, the provisions of which are saved by the Prison Act, 1877, s. 13.

SECTION 8.

OF CONSTABLES.

Whether high constables (viz., constables of hundreds, wapentakes, &c.) originated with the statute of Winton, 13 Edw. 1, st. 2, c. 6, which mentions them, or came in with justices of peace in 1 Edw. 3 (st. 2, c. 16) as their proper officers, or existed at common law as subordinate to the ancient conservators of the peace, was *verata quæstio* (e); but the preponderance of authority seems to show the latter (f). The high constable was formerly an officer of high importance, as forming the link between the acting portion of the magistracy and all the petty constables throughout the hundred or division. He had the same authority as the petty constable in breaches of the peace; and both were formerly appointed at the sheriff's tourn (g), unless there was a lord of the hundred who had a leet; in which case he was high constable, and his steward of the leet admitted the petty constables chosen there by the suitors (h).

Of high constables.

However, after the disuse of the sheriff's tourn and of courts leet, the right of appointing a high or chief constable devolved on the general body of the justices of the county, or of the riding in Yorkshire, or division in Lincolnshire (i), to be exercised nowhere but at their general or quarter sessions (k).

Appointment of high constable.

By 7 & 8 Vict. c. 33, s. 8, where high constables had been theretofore usually appointed at quarter sessions they were thereafter to be appointed by justices at the special sessions held for each division of the county for the purpose of hearing appeals against the rates of the several parishes in such division. After this statute high constables were appointed either at courts leet, having the privilege of making such appointment, or at special sessions by the justices.

By whichever authority appointed, the high constable was required at once to take an oath for the due execution of his office. This oath, if he was present at the court at which he was appointed, he took there and then; if absent he was required to take it before a justice of the peace for the county (l). He was also required until 1868 to take oaths of

(e) See *per* Twisden, J., *Homeby's case* (1679), 1 Mod. 13; *R. v. Wyatt* (1703), 1 Salk. 380.

(f) See authorities collected *arguendo*, *R. v. Watkinson* (1839), 10 A. & E. 288.

(g) 4 Inst. 265.

(h) Dalton, c. 28; Bac. Ab. tit. *Constable* (A), 683. See *per* Lord Tenterden, in *R. v. Adlard* (1825), 4 B. & C. 779; and other cases cited, *post*.

(i) See *Evans v. Stevens* (1791), *per* Lord Kenyon, 4 T. R. 227.

(k) *R. v. Watkinson* (1839), 10 A. & E. 288.

(l) For further information on this subject, see Dalt. 28; *Foot v. Prowse* (1724), Stra. 625; *R. v. Hitchchurch (Inhab.)* (1827), 7 B. & C. 577.

allegiance, supremacy and abjuration, but these oaths were abolished in connection with this, and most other offices, by the Premissory Oaths Act, 1868 (31 & 32 Vict. c. 72), s. 9, by which Act a declaration was substituted for the oath of office.

It was formerly the duty of high constables to serve notices of the holding of special sessions personally on the justices of the peace of the division, but they were relieved of this duty by 32 & 33 Vict. c. 47. They also had various duties to perform with reference to the preparation of jury lists, the summoning of juries, &c. under the Juries Act, but these were abolished by the Juries Act, 1862 (25 & 26 Vict. c. 107), s. 3.

Previous to 1827, in some parts of England the petty constables of the several parishes had been required to appear at a petty session held previously to every general gaol delivery and quarter session for the county in which such parishes were situate, and to make and sign before the justices attending such petty session presentments respecting "Popish recusants, persons absenting themselves from their parish church or other place of religious worship licensed by authority, rogues and vagabonds, inmates, retailers of brandy, ingrossers, forestallers, regraters, profane swearers and cursers, servants out of service, felonies and robberies, unlicensed or disorderly alehouses, false weights and measures, highways and bridges, riots, routs, and unlawful assemblies," whether the poor were well provided for, and whether constables were legally chosen and sworn, and it was the duty of the high constables to deliver such presentments to quarter sessions. This system of presentments was abolished by 7 & 8 Geo. 4, c. 38.

Previous to 1844 high constables were employed in collecting the county rates, and they had to give security, but their duties in this regard were transferred to the guardians of the poor by 7 & 8 Vict. c. 33, upon future vacancies happening in the office of high constable ^(m).

Abolition of
the office.

The duties of the office having been diminished, it was by the 32 & 33 Vict. c. 47 ⁽ⁿ⁾, recited, that it was expedient to abolish the office of high constable in England and Wales, except in certain cases, and to make provision for the discharge of the duties heretofore performed by such constables, and enacted ^(o) that it should be the duty of the quarter sessions, held in the January next after the passing of the Act, to consider and determine whether the office of high constable within each hundred and other districts within their jurisdiction was necessary, and, if not, they should give notice to the person or persons in whom the appointment of

^(m) And see 15 & 16 Vict. c. 81, ss. 25, 36.

⁽ⁿ⁾ The High Constables Act, 1869.

^(o) 32 & 33 Vict. c. 47, s. 2.

such high constable was vested, and upon a vacancy such office should not be filled up; but this provision was not to apply to the case of any high constable who was by law or custom returning officer at any parliamentary or municipal election, or was charged with the supervision of the register of electors, or in whom was vested, by virtue of his office, any real property. Provision was also made by the 6th section of 32 & 33 Vict. c. 47, for compensation to be paid to high constables for the loss, if any, of emoluments consequent upon that Act. Compensation on loss of office.

And by the same Act it is provided, that "In every action to be brought or summary claim to be preferred against any hundred or other like district, of which there is no high constable, the process for appearance in the action and the notice required in the case of the claim shall be served upon the chief constable or other chief officer of police for the time being of the county in which such hundred or district is situate; and all matters which by any Act the high constable of a hundred is authorised or required to do, in either of such cases shall be done by the officer so served, who shall have the same powers, rights and remedies and be subject to the same liabilities as any high constable would, but for the passing of this Act, have had and incurred under any Act of Parliament; and in case of the termination of his office by death or otherwise his successor shall act in his stead (*p*). Actions against hundreds to be defended by chief constables.

The appointment of parish constables (except for purposes unconnected with the preservation of the peace) was transferred to justices in special sessions by 5 & 6 Vict. c. 109. By this Act, sect. 5, every able-bodied man, resident within the parish, between the ages of twenty-five years and fifty-five years, rated to the relief of the poor or to the county rate on any tenements of the net annual value of 4*l.* or upwards, except such persons as should be exempt or disqualified as in the Act mentioned, should be qualified and liable to serve as constable of that parish.

But by the Parish Constables Act, 1872 (35 & 36 Vict. c. 92), the *general* appointment of parish constables is now rendered unnecessary, and they are not to be appointed except in cases where the quarter sessions deem it necessary for the preservation of the peace, or the proper discharge of the duty in any parish.

Every parish constable appointed under the Act is to be subject to the authority of the chief constable of the county (s. 11), and such constables may be remunerated as in the Act mentioned.

The Acts relating to the appointment of parish constables still in force are 5 & 6 Vict. c. 109; 7 & 8 Vict. c. 52; 13 & 14

(*p*) 32 & 33 Vict. c. 47, s. 6; and see the Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38).

Vict. c. 20 ; 35 & 36 Vict. c. 92. Statutes 33 Geo. 3, c. 55, and 5 Geo. 4, c. 83, contain provisions for punishing constables guilty of neglect of duty.

The metropolitan police system dates from 1829 (10 Geo. 4, c. 44). By that statute the metropolitan police district was formed. This district does not include the city of London and its liberties (2 & 3 Vict. c. 47, s. 2), but includes the county of London and any part of any parish or place within 15 miles of Charing Cross which her Majesty, with the advice of the privy council, may be pleased to include. (10 Geo. 4, c. 44, ss. 4, 34 ; 2 & 3 Vict. c. 47, s. 2 ; 51 & 52 Vict. c. 41, s. 40 ; Order in Council, 3rd January, 1840 ; 4 St. Rules and Orders Revised, p. 1201.) A separate police force exists for this district, over which the county authorities of the various counties or parts of counties included have no jurisdiction. The force is governed by the commissioners of police for the metropolis. A chief commissioner of police and three assistant commissioners are appointed by the crown by warrant under the sign manual. These commissioners are justices of the peace for London, Middlesex, Surrey, Hertford, Essex, Kent, Berks and Bucks (10 Geo. 4, c. 44, s. 1 ; 2 & 3 Vict. c. 47, s. 4 ; 19 & 20 Vict. c. 2, s. 2 ; 47 & 48 Vict. c. 17, s. 2), and on the Thames flowing through those counties (57 & 58 Vict. c. clxxxvii. ss. 204, 205). The commissioners, however, may not act as justices at general or quarter sessions, but only act as justices for the preservation of the peace, the prevention of crime and the detection and committal of offenders, and carrying out the Metropolitan Police Acts. The constables are appointed by the commissioners with the sanction of the secretary of state. They have all the powers and privileges of a constable at common law or by statute in the counties of London, Middlesex, Surrey, Hertford, Essex, Kent, Berks and Bucks (10 Geo. 4, c. 44, s. 4 ; 2 & 3 Vict. c. 47, s. 5), and upon the Thames within or adjoining to Middlesex, Surrey, Berks, Essex and Kent. It is the duty of the commissioners of police to take care that a sufficient number of constables belonging to the metropolitan force shall be in attendance upon every magistrate sitting at any police court within the limits of the metropolitan police district, and at every other criminal court holden within the said district, for the purpose of executing such summonses and warrants as may be directed to them. (2 & 3 Vict. c. 47, s. 11.) All summonses and warrants to be issued in any criminal proceeding within the metropolitan police district, or by any magistrate within the said district, must be served and executed by a constable of the metropolitan police force, and by none other. (*Ib.* sect. 12.) Where any warrant shall be directed or delivered to any of the said constables, unless it be necessary for the due execution thereof that such warrant should be executed without delay, the constable must deliver same to his superintendent or other superior officer, who must appoint, by indorsement

thereon, one or more constables to execute the same; and every constable, whose name shall be so indorsed, shall have the powers, privileges and protections for and in the execution of such warrant, as if the same had been originally directed to him or them by name. (*lb.* sect. 13.) Every warrant to compel the appearance of any person charged with any offence, issued by a metropolitan police magistrate, in respect of any matter arising within the metropolitan police district, may be served or executed out of the metropolitan police district by the constable or constables to whom the same shall be directed, and shall have the same force and effect as if the same had been originally issued or subsequently indorsed by a justice or justices of the peace having jurisdiction in the place where the same shall be served or executed (*p*).

The present police system(*q*) in counties outside the metropolitan police district was inaugurated by the County Police Act, 1839 (2 & 3 Vict. c. 93), made compulsory by the County Police Act, 1856 (19 & 20 Vict. c. 69). Under those Acts, and the Acts amending them, the police force in the counties was, until the Local Government Act, 1888 (51 & 52 Vict. c. 41), controlled by the justices. By the last-mentioned Act the powers, duties and liabilities of quarter sessions, and of justices out of session with respect to the county police, were vested in and attached to the quarter sessions and the county council jointly, and are now exercised and discharged through the standing joint committee of the quarter sessions and the county council, appointed in accordance with the provisions of the Act. (Sect. 9 (1).) Under this section the control over the division of a county into police districts is vested in the joint committee(*r*). Sect. 9 (2) of the Act of 1888 provides that the powers conferred by sect. 7 of the County and Borough Police Act, 1856 (19 & 20 Vict. c. 69), which requires constables to perform, in addition to their ordinary duties, such duties connected with the police as the quarter sessions may direct or require, shall continue to be exercised by the quarter sessions as well as by the standing joint committee, and may also be exercised by the county council; and the said section is to be construed as if the county council and the standing joint committee were therein mentioned as well as the quarter sessions.

The section referred to (19 & 20 Vict. c. 69, s. 7) provides

(*p*) As to the execution in Scotland, Ireland or the Channel Islands of English warrants and *vice versa*, see 11 & 12 Vict. c. 42, ss. 12—15; 11 & 12 Vict. c. 43, s. 3; 14 & 15 Vict. c. 93; 30 & 31 Vict. c. 19; 44 & 45 Vict. c. 24; and as to prisoners, see 16 & 17 Vict. c. 30, s. 9; and generally for full information on the metropolitan police system, see Archibald's Metropolitan Police Guide.

(*q*) For full information upon the subject of the county and borough police, the reader is referred to "Carmichael on the County and Borough Police Acts."

(*r*) *Ex parte Leicestershire County Council*, [1891] 1 Q. B. 53.

that constables shall, in addition to their ordinary duties, perform all such duties connected with the police in their respective counties or boroughs as the justices in general or quarter sessions assembled, or the watch committees of such respective counties or boroughs, from time to time require.

Nothing in the Act is to affect the powers, duties and liabilities of justices of the peace as conservators of the peace, or the obligation of the chief constable or other constables to obey their lawful orders given in that behalf. (Sect. 9 (3).)

Appointment
of chief
constable.

By 2 & 3 Vict. c. 93, s. 4, the [*justices of the county in general or quarter sessions assembled, or at any adjournment thereof*] (*rr*) shall, subject to the approval of the secretary of state, appoint a person duly qualified to be chief constable of the county, and in every case of vacancy of the office shall, subject to the like approval, appoint another fit person in his room; and every chief constable so to be appointed may hold his office until dismissed by [*the justices in general or quarter sessions assembled, or at any adjournment thereof*]; and by 20 Vict. c. 2, s. 2 [*the justices of the peace of any county in general or quarter sessions assembled, subject to the provisions of the 2 & 3 Vict. c. 93*], may appoint a person to be chief constable of their county or of part thereof, although he may hold or be appointed to the office or offices of chief constable of any adjoining county or counties, or part or parts of counties: provided that [*the justices of each county in general or quarter sessions assembled*] shall declare their consent that the office in their appointment may be held by such person together with such other office or offices.

Deputy chief
constable.

By 2 & 3 Vict. c. 93, s. 7, the chief constable shall, subject to the approval of [*the justices in general or quarter sessions assembled, or at any adjournment thereof*], appoint one of the superintendents to act as his deputy in case of his being incapable, from illness or necessary absence from the county, to perform the duties of chief constable of the county; and the deputy so appointed shall, in such case as aforesaid, and also in case of the vacancy of the office of chief constable by death or otherwise, have all the powers, privileges and duties of the chief constable: provided that no deputy chief constable shall be capable of continuing to act with the powers of chief constable during any vacancy of the office for more than three calendar months after the vacancy has been occasioned.

Appointment
of superinten-
dents.

The chief constable is empowered to appoint the other constables to be appointed for the county and a superintendent to be at the head of the constables in each petty sessional division of the county, and at his pleasure may dismiss all or any of them, and shall have the direction and government of them subject to the lawful orders of [*quarter sessions*] and the rules of the force (2 & 3 Vict. c. 93, s. 6); but inasmuch

(*rr*) Now the standing joint committee of the quarter sessions and county council. See *post*, p. 86.

as it was found not always necessary that a superintendent should be appointed for every petty sessional division, the [*justices in general or quarter sessions assembled*], with the approval of her Majesty's principal secretaries of state, may direct how many of the constables shall be appointed superintendents, and may direct the appointment of inspectors and serjeants and other subordinate officers, with such gradations of rank and pay, and such variety of duties, as shall be found expedient; and the [*justices*] may make such orders as to them shall appear expedient touching the attendance of the superintendents, inspectors, serjeants and other subordinate officers, among the said constables, upon the justices at their several sessions (*s*).

Upon the certificate of one of her Majesty's principal secretaries of state that the police of any county or borough established under 2 & 3 Vict. c. 93, 3 & 4 Vict. c. 88, and 5 & 6 Will. 4, c. 76, and 19 & 20 Vict. c. 69, has been maintained in a state of efficiency in point of numbers and discipline for the year ending on the 29th of September then last past, the commissioners of her Majesty's Treasury may pay such sum towards the expenses of such police for the year mentioned in such certificate [*as shall not exceed one-fourth of the charge for their pay and clothing*] (*t*), but such payment shall not extend to any additional constables appointed under 3 & 4 Vict. c. 88, s. 19; provided that before any such certificate shall be finally withheld in respect of the police of any county or borough, the report of the inspector relating to the police of such county or borough shall be sent to the [*justices of such county*] or to the watch committee of such borough, who may address any statement relating thereto to the secretary of state; and in every case in which such certificate is withheld, a statement of the grounds on which the secretary of state has withheld such certificate, together with any such statement of [*the justices*] or watch committee as aforesaid, shall be laid before Parliament (*u*).

The chief constable and other persons so appointed shall be sworn as constables before a justice of the county, and shall have all the powers, privileges and duties throughout the county, and also in all liberties and franchises and detached parts of other counties locally situated within such county, and also in any county adjoining to the county for which they are appointed, which any constable duly appointed has within his constablewick by virtue of the common law, or of any statute made or to be made; and every provision of the 1 & 2 Will. 4, c. 41, shall be deemed to extend to the con-

Chief constable to make declaration in lieu of oath.

(*s*) 3 & 4 Vict. c. 88, s. 26.

(*t*) All limit in amount of contribution was removed by 38 & 39 Vict. c. 48, and the Police Act, 1890, s. 17, now provides for the distribution amongst police forces of sums granted out of customs and excise duties for police superannuation.

(*u*) 19 & 20 Vict. c. 69, s. 16.

stables appointed under this Act, except as to the manner of their appointment and dismissal, the time for which they shall serve, and the manner in which their allowances shall be paid, or as to any matter herein expressly otherwise provided (*x*). A declaration is substituted for the oath by 31 & 32 Vict. c. 72, s. 12, sub-s. 4.

Duty of chief constable to attend at sessions ;

and superintendents of divisions.

Every chief constable, unless prevented by sufficient cause, shall attend every general and quarter sessions of the justices of the county, and at every adjournment thereof, and shall make quarterly reports to the justices of all matters which they shall require of him concerning the police of the county; and shall obey all lawful orders and warrants of the said justices in the execution of his duty; and the superintendents of divisions shall, in like manner, attend every sessions of the justices holden for their respective divisions, and shall make the like reports to the justices of such divisions (*y*).

Provision is made for the appointment of a deputy by sect. 7.

Allowances in respect of expenses.

In addition to the salary to be paid to the chief constable of the county reasonable allowances shall be made him for extraordinary expenses necessarily incurred by him and by the constables under his orders in the apprehension of offenders, and in the execution of his and their duty under this Act, which allowances shall be examined and audited by [*the justices of the county in quarter sessions assembled*] (*z*); but the costs of a prosecution for a libel upon an inspector of police, of him in his character of inspector of public houses, cannot be allowed (see *R. v. Mayor, &c. of Liverpool* (1872), 41 L. J. Q. B. 175).

Petty constables in county constabulary. Appointment of.

Subject to the approval of two or more of the justices of the county in petty sessions assembled, the chief constable shall appoint the other constables to be appointed for the county, and a superintendent to be at the head of the constables in each division of the county, and at his pleasure may dismiss all or any of them, and shall have the general disposition and government of all the constables so to be appointed, subject to such lawful orders as he may receive from [*the justices in general or quarter sessions assembled, or at any adjournment thereof*], and to the rules established for the government of the force (*a*).

Upon the appointment of constables under 2 & 3 Vict. c. 93, in any county, or in any division of a county, the power to appoint and pay and to make rates for paying any constables in any hundred, parish, borough or place within such county or division, except boroughs within [45 & 46 Vict. c. 50], other than high constables or special constables, under 1 & 2 Will. 4, c. 41, and also all the powers and duties of all such constables, shall cease and determine. Provided also, that

(*x*) 2 & 3 Vict. c. 93, s. 8.

(*y*) *Ibid.* s. 17.

(*z*) *Ibid.* s. 18.

(*a*) *Ibid.* s. 6.

nothing herein contained shall prevent or invalidate the appointment of parochial constables (*b*).

A warrant directed for execution to "The constable of _____," a place possessing a parish constable, though also within the jurisdiction of the county police, must be executed by the parish constable, and the county constable is not entitled to execute it (*c*). Direction of warrant.

By 19 & 20 Vict. c. 69, s. 6, county constables appointed under 2 & 3 Vict. c. 93 and 3 & 4 Vict. c. 88, have in every borough wholly or in part within the county all such powers and duties, privileges and responsibilities as the constables of the borough have within the county, and they must obey the commands of the borough justices in which they are called upon to act, for conducting themselves in the execution of their office (*d*). Duties of, in boroughs.

No county constable shall, as such constable, be required to act in any borough having a separate police establishment, except in execution of warrants of justices of such county, or by the order of the chief constable or his superintendent; and in all cases of special emergency the chief constable or superintendent, when required so to do by the watch committee of any borough having a separate police establishment, shall have power to direct the county constables to act within such borough; and no constable of any borough having a separate police establishment shall, as such constable, be required to act out of his borough, except in execution of warrants of justices of such borough or in pursuance of directions from the watch committee in case of special emergency (*e*).

And the constables acting under 2 & 3 Vict. c. 93; 3 & 4 Vict. c. 81, and [45 & 46 Vict. c. 50], shall in addition to their ordinary duties perform all such duties connected with the police in their respective counties or boroughs as the [*justices in general or quarter sessions, or the*] watch committees of such respective counties or boroughs, from time to time direct and require (*f*).

Nothing in 2 & 3 Vict. c. 93 is to authorize the [*justices*] for any county to appoint any constable in any borough within [45 & 46 Vict. c. 50]. But by 19 & 20 Vict. c. 69, power is given to a borough to require a consolidation of its police with the county, giving the same powers in boroughs to the county police as the counties to the borough police (sects. 5, 6, 7).

The chief constable is empowered to suspend any constable Power of suspension, fining, &c.

(*b*) 2 & 3 Vict. c. 93, s. 25.

(*c*) *R. v. Saunders* (1867), L. R. 1 C. C. R. 75; *Freegard v. Barnes* (1852), 21 L. J. Ex. 320.

(*d*) 19 & 20 Vict. c. 69, s. 6.

(*e*) 22 & 23 Vict. c. 32, s. 2.

(*f*) 19 & 20 Vict. c. 69, s. 7.

within his jurisdiction, or may fine him not more than a week's pay or may reduce his rank (*g*).

The powers of the justices under the foregoing Acts are now varied and diminished by the Local Government Act, 1888 (51 & 52 Vict. c. 41). By sect. 9 (1), it is enacted that the powers, duties and liabilities of quarter sessions and of justices out of session with respect to the county police shall, on and after the appointed day [1st April, 1889], vest in and attach to the quarter sessions and the county council jointly, and be exercised and discharged through the standing joint committee of the quarter sessions and county council as thereafter mentioned. Sect. 9 (3) enacts that nothing in this Act shall affect the powers, duties and liabilities of justices of the peace as conservators of the peace, or the obligation of the chief constable or other constables to obey their lawful orders given in that behalf.

By sect. 30 (1), for the purpose of the police, and the clerk of the peace, and of clerks of the justices, and joint officers, and of matters required to be determined jointly by the quarter sessions and the council of a county, there shall be a standing joint committee of the quarter sessions and the county council, consisting of such equal number of justices appointed by the quarter sessions and of members of the county council appointed by that council as may from time to time be arranged between the quarter sessions and the council, and in default of arrangement such number taken equally from the quarter sessions and the council as may be directed by a secretary of state.

Sect. 30 (2) provides that the joint committee shall elect a chairman, and in the case of an equality of votes for two or more persons as chairman, one of these persons shall be elected by lot. By sect. 30 (3), any matter arising under the Local Government Act, 1888, with respect to the police, or to the clerk of the peace, or to clerks of the justices, or to officers who serve both the quarter sessions or justices and the county council, or to the provision of accommodation for the quarter sessions or justices out of session, or to the use by them or the police or the said clerks of any buildings, rooms or premises, or to . . . any sums received by clerks to justices, or with respect to anything incidental to the above-mentioned matters, and any other matter requiring to be determined jointly by the quarter sessions and county council, shall be referred to and determined by the joint committee under this section; and all such expenditure as the said joint committee determine to be required for the purposes of the matters above in this section mentioned shall be paid out of the county fund, and the council of the county shall provide for such payment accordingly.

. As to boroughs within the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), the borough police are appointed by the watch committee under sect. 191 of that Act, which provides as follows:—(1) The watch committee shall from time to time appoint a sufficient number of fit men to be borough constables. (2) A borough constable shall be sworn in (*h*) before a justice of the peace having jurisdiction in the borough, and when so sworn shall, in the borough, in the county in which the borough is situate, and in every county being within seven miles (*i*) from any part of the borough, and in all liberties in any such county, have all such powers and privileges, and be liable to all such duties and responsibilities as any constable has, and is liable to, for the time being in his constablewick, at common law or by statute, and shall obey all such lawful commands as he receives from any justice having jurisdiction in the borough or in any county in which the constable is called on to act. (3) The watch committee may from time to time frame such regulations as they deem expedient for preventing neglect or abuse, and for making the borough constables efficient in the discharge of their duties. (4) The watch committee, or any two justices having any jurisdiction in the borough, may at any time suspend, and the watch committee may at any time dismiss, any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same.

The Act contains provisions as to copies of regulations made by watch committees being sent to the secretary of state (sect. 192); as to power of borough constables to arrest idle and disorderly persons, &c. (sect. 193); and as to penalties for assaults on constables, &c. (sect. 195).

In addition to the power of dismissal vested in the watch committee under sect. 191, sub-sect. (4), if a borough constable is guilty of neglect of duty or of disobedience to a lawful order, he shall for every such offence be liable on summary conviction to imprisonment not exceeding ten days, or, in the discretion of the court, to a fine not exceeding forty shillings, or to be dismissed from his office (sect. 194).

“Special” constables may also be appointed when occasion requires. The statutes relating to special constables are 1 & 2 Will. 4, c. 41; 5 & 6 Will. 4, c. 43; and (in boroughs) 45 & 46 Vict. c. 50, s. 196.

“Additional” constables may be appointed under the Police Acts. They are appointed on the application and at the cost of private individuals, and for prescribed areas, and

(*h*) But by sect. 12 (4) of the Promissory Oaths Act, 1868 (31 & 32 Vict. c. 72), a declaration was substituted in lieu of an oath in the case of constables. Having regard to sect. 239 (2) of the Act, it is submitted that the words “sworn in” mean make the declaration required by the Promissory Oaths Act. See Home Office Circular, 9th July, 1881.

(*i*) Measured as the crow flies. See sect. 231.

they form part of the recognised police force. (3 & 4 Vict. c. 88, s. 19.)

Constables for the special purpose of performing police duties upon and in the neighbourhood of public works may be appointed under 1 & 2 Vict. c. 80.

Constables may be appointed to act on canals and navigable rivers under 3 & 4 Vict. c. 50, s. 1.

SECTION 9.

OF THE JURORS.

Grand jury.	The grand jury in counties consists of gentlemen selected out of the county by the <i>sheriff</i> , and returned by him to the sessions of the peace to inquire, present, do and execute all those things which on the part of the King shall then and there be commanded of them. In boroughs they are summoned by the clerk of the peace (<i>k</i>).
Number of.	The grand jury must consist of twelve at the least, and may contain any greater number, not exceeding twenty-three, in order that twelve may form a majority of the jurors (<i>l</i>). For if a number amounting to two full juries or more should be sworn, it might happen that a complete jury of twelve might find a bill to be true, though other twelve or more of the same jury might reject it as untrue; which would be inconvenient and absurd (<i>m</i>). It suffices if twelve of the grand jurors agree to the finding, though the rest disagree (<i>n</i>).
Qualification.	The qualifications of grand jurors and petit jurors at sessions are the same in counties since 6 Geo. 4, c. 50, and in boroughs within the Municipal Corporations Act, 1835 (5 & 6 Will. 4, c. 76), repealed and replaced by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).
Qualification of jurors in counties in England.	Every man, except as hereinafter excepted, between the ages of twenty-one years and sixty years, residing in any county in England, who shall have in his own name, or in trust for him, within the same county, 10 <i>l</i> . by the year above reprises, in lands or tenements, whether of freehold, copyhold or customary tenure, or of ancient demesne, or in rents issuing out of any such lands or tenements, or in such lands, tenements

(*k*) 45 & 46 Vict. c. 50, s. 186.

(*l*) *Clyncard's case* (1599), Cro. Eliz. 654; *R. v. Marsh* (1837), 6 A. & E. 236.

(*m*) 2 Burr. 1088.

(*n*) 2 Hale, 16; Burn's Justice, vol. 3, p. 65, 30th ed.

and rents taken together, in fee simple, fee tail, or for the life of himself or some other person; or who shall have, within the same county, 20*l.* by the year above reprises, in lands or tenements held by lease or leases for the absolute term of twenty-one years, or some longer term, or for any term of years determinable on any life or lives; or who, being a householder, shall be rated or assessed to the poor rate, or to the inhabited house duty, in the county of Middlesex on a value of not less than 30*l.*, or in any other county on a value of not less than 20*l.*; or who shall occupy a house containing not less than fifteen windows, shall be qualified and shall be liable to serve on *grand juries* in courts of *sessions of the peace*, and on *petty juries* for the trial of all issues joined in such courts of session of the peace, and triable in the county, riding or division in which every man so qualified respectively shall reside (*o*). By the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 7, the qualifications of persons as jurors in Wales shall be the same as the qualifications of persons as jurors in England. In Wales.

Aliens having been domiciled in England or Wales for ten years or upwards, if in other respects duly qualified, shall be qualified and shall be liable to serve on juries or inquests in England and Wales as if they had been natural-born subjects of the King; but, save as aforesaid, no man not being a natural-born subject of the King shall be qualified to serve on juries or inquests in any court or on any occasion whatsoever (*p*). The persons described in the schedule thereto (as therein specified) are severally exempt from being returned to serve, and from serving upon any juries or inquests whatsoever, and their names shall not be inserted in the lists of the persons qualified and liable to serve on the same; but, save as aforesaid, no man otherwise qualified to serve on such juries or inquests shall be exempt from serving thereon, any enactment, prescription, charter, grant or writ to the contrary notwithstanding (*q*). Aliens.

Every burgess of a borough having a separate court of quarter sessions shall, unless by law exempt, or disqualified, be qualified and liable to serve on grand juries in the borough, and on juries for the trial of issues joined (*r*). The clerk of the peace shall give public notice of the time and place of holding the court ten days at least before the holding thereof, and shall, seven days at least before the holding thereof, summon a sufficient number of persons qualified and liable to serve as grand jurors at the sessions (*s*). Qualification in boroughs.

(*o*) 6 Geo. 4, c. 50, s. 1.

(*p*) 33 & 34 Vict. c. 77, s. 8.

(*q*) *Ibid.* s. 9; 45 & 46 Vict. c. 50, s. 186.

(*r*) 45 & 46 Vict. c. 50, s. 186 (1).

(*s*) *Ibid.* sub-s. (2).

The following persons are exempt from serving on juries under the Juries Act, 1870 (33 & 34 Vict. c. 77), Schedule :—

Peers, members of parliament, judges, clergymen, Roman Catholic priests, ministers of any congregation of Protestant Dissenters and of Jews whose place of meeting is duly registered, provided they follow no secular occupation except that of schoolmaster. Serjeants, barristers-at-law, certified conveyancers and special pleaders if actually practising.

Members of the society of doctors of law and advocates of the civil law, if actually practising.

Attornies, solicitors and proctors, if actually practising and having taken out their annual certificates, and their managing clerks, and notaries public in actual practice.

Officers of the courts of law and equity, and of the admiralty and ecclesiastical courts, including therein the courts of probate and divorce, and the clerks of the peace or their deputies, if actually exercising the duties of their respective offices.

Coroners, gaolers and keepers of houses of correction, and all subordinate officers of the same.

Keepers in public lunatic asylums.

Members and licentiates of the royal college of physicians in London, if actually practising as physicians.

Members of the royal college of surgeons in London, Edinburgh and Dublin, if actually practising as surgeons.

Apothecaries certificated by the court of examiners of the apothecaries company, and all registered medical practitioners and registered pharmaceutical chemists, if actually practising as apothecaries, medical practitioners, or pharmaceutical chemists respectively.

Officers of the navy, army, militia and yeomanry while on full pay.

The members of the Mersey docks and harbour board.

The master, wardens and brethren of the corporation of Trinity House of Deptford Strond.

Pilots licensed by the Trinity House of Deptford Strond, Kingston-upon-Hull, or Newcastle-upon-Tyne, and all masters of vessels in the buoy and light service employed by either of those corporations, and all pilots licensed under any Act of Parliament or charter for the regulation of pilots.

The household servants of his Majesty, his heirs and successors, officers of the post office, commissioners of customs, and officers, clerks or other persons acting in the management or collection of the customs, commissioners of inland revenue, and officers or persons appointed by the commissioners of inland revenue, or employed by them, or under their authority or direction in any way relating to the duties of inland revenue.

Sheriff's officers.

Officers of the rural and metropolitan police.

Magistrates of the metropolitan police courts, their clerks, ushers, doorkeepers and messengers.

Members of the council of the municipal corporation of any

borough, and every justice of the peace assigned to keep the peace therein; and the town clerk and treasurer for the time being of every such borough, so far as relates to any jury summoned to serve in the county where such borough is situate.

Burgesses of every borough in and for which a separate court of quarter sessions shall be holden, so far as relates to any jury summoned for the trial of issues joined in any court of general or quarter sessions of the peace in the county wherein such borough is situate.

Justices of the peace so far as relates to any jury summoned to serve at any sessions of the peace for the jurisdiction of which he is a justice.

Officers of the houses of lords and commons.

The following persons are exempt under special Acts:—

Registered dentists, if they so desire (Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 30).

All soldiers in his Majesty's regular forces (44 & 45 Vict. c. 58, s. 147).

Collectors of inland revenue (53 & 54 Vict. c. 21, s. 8).

General or additional commissioners of income tax, as to the counties in which they dwell, so long as they hold a certificate under 5 & 6 Vict. c. 35 (43 & 44 Vict. c. 19, s. 40).

Members of the council of a county of a city so far as relates to service on the trial of indictments removed into the adjoining county at large (38 Geo. 3, c. 52, s. 11).

Registrars of births, deaths and marriages (7 Will. 4 & 1 Vict. c. 22, s. 18).

Members of the London County Council as to juries within the administrative county of London (London Council General Powers Act, 1890 (53 & 54 Vict. c. cxxliii.), s. 26).

These exceptions are cases not of disqualification, but of privilege; therefore any of the parties returned may lawfully serve at the sessions without objection, if they take the oath required, and possess all other qualifications (*t*).

No man who has been or shall be [*attainted of any treason or felony, or*] convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry, is or shall be qualified to serve on juries or inquests in any court or on any occasion whatsoever (*u*).

(*t*) 3 Burn's Justice, 30th ed. p. 68. In the first edition of this work it is suggested that it is the practice not to summon those persons to serve as jurors at sessions who are on the sheriff's list to serve as such at the assizes, but the present editors know not whether the suggestion is or is not well founded.

(*u*) 33 & 34 Vict. c. 77, s. 10. By sect. 1 of the Forfeiture Act, 1870 (33 & 34 Vict. c. 23), passed in the same session of Parliament as the Juries Act of the same year, no confession, verdict, inquest, conviction or judgment of or for any treason or felony shall cause any attainder or corruption of blood. It is submitted that, reading the two Acts together, the words "*attainted of any treason or felony*," in sect. 10 of the Juries Act, must be understood to mean "*convicted of any treason or felony*."

Lists of jurors
for counties,
&c.

In order to secure the service on juries of all proper persons in due rotation, the statute 25 & 26 Vict. c. 107, s. 4, proceeds to lay down a plan for the return of their names to the sessions, checked and controlled by the supervision of the magistrates. For this purpose it requires the clerk of the county council (*x*), on or before the 20th of July in every year, to issue his precept to the overseers of the poor of the several parishes, and to the overseers of the poor of the several townships within their respective parishes and townships, requiring them to make out, before the 1st of September, a true list of all persons then residing within their respective parishes and townships qualified and liable to serve on juries, and further to comply with the requisitions of the precept. And he is to forward every precept so issued, and to annex a competent number of printed forms of returns for the use of the respective persons by whom such returns are to be made by post in a registered letter with the words "jury precept" on the outside, which is to be deemed service of the same, which documents he must cause to be printed and registered at the county's charge (*y*).

This Act is not to affect the mode of summoning jurors in the city of London (*z*).

In pursuance of the precept, the overseers are forthwith to prepare in alphabetical order a true list of every man residing within their respective parishes, &c., who shall be qualified and liable to serve on juries, with the christian and surname written at full length, with the true place of abode, the title, quality, calling or business and the nature of the qualification of every such man in the proper columns of the form of return given in the schedule to the Act, and to sign such list (*a*). And, in addition to this, by the 33 & 34 Vict. c. 77, s. 11, they are to specify which of the persons are entitled to be special jurors, and the nature of the qualification, and also the occupation and the amount of the rating or assessment of every such person; and a notice to the effect that no person whose name is in the jury book as a juror will be excused attendance on the ground of any disqualification or exemption other than illness, not claimed by him at or before the revision of the list by the justices of the peace (*b*), shall be printed at the bottom of every jury list.

Publication
of list.

A copy of the list so made out by the parish officers, signed by them, is to be affixed by them to the doors of the places of worship in the parish, to remain during the three first Sundays

(*x*) Formerly the clerk of the peace, but now the clerk to the county council: 51 & 52 Vict. c. 41, s. 83 (6).

(*y*) 25 & 26 Vict. c. 107, s. 5.

(*z*) *Ibid.* s. 14.

(*a*) 25 & 26 Vict. c. 107, s. 6; 6 Geo. 4, c. 50, s. 8.

(*b*) 33 & 34 Vict. c. 77, s. 12.

of September, with the notice subjoined as mentioned in the precept (c), and the original list is to be open to the inspection of the parishioners. On some day within the last seven days of September, in every year, at a day and place of which the clerk of the justices shall have given notice, before the preceding 20th August, to the clerk of the county council and to the overseers of every parish and township in the division, the justices of the division are to hold a special petty session, at which the parish officers must attend, and produce their lists, and answer on oath any questions which may be asked by the magistrates respecting them. At this session the justices are authorised, on the oath of any party complaining, or other proof, or on their own knowledge, that he is not liable or qualified to serve (*e.g.*, for being under or over age, or want of qualification by property, &c.), to strike his name out of the list returned, and also to strike out the names of men disabled by lunacy, imbecility of mind, deafness, blindness, or other permanent infirmity of body, from serving on juries (*d*).

Special sessions to revise lists.

They are also empowered to amend the lists, by introducing the name of any person improperly omitted; or to correct any error in the name or description of a person who is mentioned in such lists, notice having been given to the party to be affected; or, if notice be not previously given, at an adjourned sessions, to be held four days thereafter, at which such parties shall be called on to show cause (*e*); and the justices may adjourn sessions to any day within seven days thereafter for the production of the jury list in any parish, or when through the default of any overseer it is not forthcoming (*f*). And upon completing the revision of the jury lists the justices at petty sessions shall certify in writing that they have examined such lists, and the same are, to the best of their belief, true and proper lists of the special and common jurors, and the decisions of justices as to qualifications of persons marked as special jurors are to be final (*g*). And the clerk of the justices in every petty sessional division is to take charge of the jury lists when allowed and sign and forward them by the next available post in a registered letter to the clerk of the county council, with a schedule of the parishes, &c. for which jury lists have been allowed, which schedule is to be signed by one of the said justices (*h*).

Power of revision in justices.

Certifying lists.

Lists deposited with the clerk of the peace.

The costs and expenses of overseers are payable out of the poor rate (*i*). The justices' clerks are not entitled to charge the overseers with fees for sending notices to return and verify

Expenses of overseers.

(c) 6 Geo. 4, c. 50, s. 9.

(d) *Ibid.* s. 10. See 13 Edw. 1, stat. 1, c. 38; 2 Inst. 447.

(e) *Ibid.* See 13 Edw. 1, stat. 1, c. 38; 2 Inst. 447.

(f) 25 & 26 Vict. c. 107, s. 8.

(g) 33 & 34 Vict. c. 77, s. 14.

(h) 25 & 26 Vict. c. 107, ss. 9, 10.

(i) 7 & 8 Vict. c. 101, s. 60.

jury lists, or for the allowance of the list and return thereof and oath; and the overseers are not entitled, if they pay such fees, to reimburse themselves out of the poor rate (*k*); but the justices' clerks are allowed a fee for making out the schedule of parishes out of the county rate (*l*).

Jurors' book.

The lists so returned to the clerk of the county council are to be kept by him among the county records, arranged with every hundred in alphabetical order, and every parish or township within such hundred also in alphabetical order; and he is required to "cause the same to be fairly and truly copied in the same order, in a book to be by him provided for that purpose at the expense of the county, with proper columns for making the register afterwards directed, and to deliver the same book to the sheriff of the county or his under-sheriff, within six weeks next after the close of such session, which book shall be called "the jurors' book for the year ————" (inserting the calendar year for which such book is to be in use); and the sheriff, on quitting his office, is to deliver the same to his successor. Every *jurors' book*, so prepared, is to be brought into use on the 1st January, after it is so delivered by the clerk of the county council to the sheriff or his under-sheriff, and is to be used for one year then next following (*m*). From this book, for the current year, and from this only, the sheriff, or in case the precept goes to the coroner, elisor or other minister, then such coroner, &c. is to return the names of jurors, unless, indeed, there be no jurors' book for the current year, and then he may return names from the book of the year preceding (*n*).

Mode of
summoning
county jurors.

Every precept to be issued for the return of jurors before the courts of sessions of the peace shall direct the sheriff to return a competent number of good and lawful men, qualified according to law, from the body of the county, without requiring any to be returned from particular hundreds, or from any particular venue within the county (*o*).

For grand
jury.

For petty
jury.

The grand jury are summoned by virtue of a precept directed to the sheriff in the form set out *ante*, p. 25. The qualification and disabilities of grand and petty jurymen to serve at sessions are now precisely similar, and the names are to be taken from the same returns (*p*) and the same precept.

The precept requires him to return twenty-four jurors to try the issues; but on this it is usual for him to return forty-eight, seventy-two, or more, according to the size of the bailiwick, and the expected number of prisoners, in order to provide

(*k*) *R. v. The Overseers of Haslingfield* (1874), 43 L. J. Q. B. 38.

(*l*) 25 & 26 Vict. c. 107, s. 9.

(*m*) 6 Geo. 4, c. 50, s. 12: 25 & 26 Vict. c. 107, s. 10.

(*n*) 6 Geo. 4, c. 50, s. 14.

(*o*) 6 Geo. 4, c. 50, s. 13. Since the passing of this Act the want of hundredors has ceased to be a cause of challenge. See form of precept, *ante*, p. 25.

(*p*) 6 Geo. 4, c. 50, s. 1.

for challenges (*q*), and the division of courts by the quarter sessions. Any person liable to serve on any jury in a county may be summoned as heretofore, or the sheriff or other proper officer may make out a summons and affix the seal of his office thereto; and such summons, having the words "jury summons" legibly written or printed on the same side as the address, may be sent open by the post prepaid, and directed to the juror at his place of abode as described in the "jurors' book" (*r*). Juries at adjourned quarter sessions are summoned by virtue of the 1 Vict. c. 4, *ante*, p. 34.

Summons may be by post.

At adjourned sessions.

In order to provide for a fair distribution of labour among parties qualified and liable to serve on grand and petty juries at the sessions in counties, it is provided, that at every session the clerk of the peace shall make out a list of such persons as shall attend to serve on any grand or petty jury at such sessions, together with their respective places of abode and additions, and the date of their services; and shall, within twenty days after the close of every such sessions, transmit such list to the sheriff or under-sheriff of the county, who is required forthwith to register the names of the men included in such list in the proper column of the jurors' book for that purpose, together with the date of their services; and every man so summoned, and having duly attended or served until discharged by the court of sessions, shall, upon application by him made to such clerk of the peace before he shall depart from the place where the sessions are holden, receive a certificate testifying such his service, which certificate the said clerk of the peace is required to give on payment of one shilling (*s*).

List of persons who have served according to summons.

Certificate of having served.

The following regulations are enacted with respect to the summoning of jurors in counties:—

1. That no person shall be summoned to serve on any jury or inquest (except a grand jury) more than once in any one year, unless all the jurors upon the list shall have been already summoned to serve during such year. Provided that nothing herein contained shall prejudice the operation of any certificate granted under the County Juries Act, 1825, ss. 41 and 42.

Regulations as to summoning in counties.

2. No person shall be exempted from serving as a common juror by reason of his being on any special jurors' list, or being qualified to serve as a grand juror.

3. No person shall be summoned or liable to serve as a juror in more than one court on the same day (*t*).

By the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 186 (4), the summons to jurors may be made by showing to the person to be summoned, or, if he is absent from his usual place of abode, by leaving with some person

(*q*) 2 Hale, 263.

(*r*) 25 & 26 Vict. c. 107, s. 11. See *post*, p. 96.

(*s*) 6 Geo. 4, c. 50, s. 41.

(*t*) 33 & 34 Vict. c. 77, s. 19.

therein inhabiting, a notice containing its substance and signed by the clerk of the peace. By sub-sect. (5) the clerk of the peace is to make out lists containing the surnames and other names, abodes and descriptions of the persons summoned; and, by sub-sect. (6), no person is to be summoned to serve as a juror more than once in any year, unless every person liable and qualified so to serve has been already summoned once in that year.

By the County Juries Act, 1825, s. 42, no man shall be returned to serve as a juror at any session of *nisi prius* or gaol delivery, in the county of Middlesex, who has served as a juror at either of such sessions in the said county, in either of the two terms or vacations next immediately preceding, and has the sheriff's certificate of having so served.

By sect. 89 of the Local Government Act, 1888 (51 & 52 Vict. c. 41), the County Juries Act, 1825, and the Acts amending the same are to apply to the county of London in like manner as they applied to the county of Middlesex, and persons are to be qualified to serve as jurors, and lists of jurors are to be made out in like manner, so nearly as circumstances admit, as in that county; and the exemption theretofore enjoyed by the inhabitants of the liberty and city of Westminster from serving on juries at quarter sessions for the county of Middlesex was abolished; but the qualification of persons to serve as jurors within the city of London is not affected by this section.

Penalties on sheriffs or their officers for misconduct in summoning jurors.

And no sheriff, under-sheriff, coroner, elisor, bailiff or other officer shall, directly or indirectly, take or receive any money or other reward, or promise of money or reward, to excuse any man from serving, or from being summoned to serve on juries, or under any such colour or pretence; and no officer appointed to summon juries shall summon any man to serve thereon other than those whose names are specified in the warrant to him directed; but if any party shall wilfully transgress in such respect, summoning parties as jurors who are not named in the warrant, he shall be liable to be fined, on summary complaint, by the court within whose jurisdiction the offence shall be committed (*u*).

Service of summons.

The summons to serve on juries at the sessions must be made by the proper officer by showing to the person to be summoned, or, in case he shall be absent from the usual place of his abode, by leaving with some person there inhabiting, a note in writing under the hand of the sheriff or other proper officer, containing the substance of the summons (*x*), or by a summons sent open by post, in manner provided by sect. 11 of the Juries Act, 1862 (*y*).

Summoning by post.

(*u*) 6 Geo. 4, c. 50, s. 43.

(*x*) *Ibid.* s. 25.

(*y*) Sect. 11 of the Juries Act, 1862 (25 & 26 Vict. c. 107), is as follows:—

And if any man having been *duly summoned* to attend on any kind of jury at a quarter sessions for the county shall not attend in pursuance of such summons, or being thrice called shall not answer to his name, or being called shall be present but not appear, or after his appearance shall wilfully withdraw himself from the presence of the court, the court shall set such fine on every such man so making default (unless some reasonable excuse shall be proved by oath or affidavit) as the court shall think meet (z).

Penalty for non-attendance in counties.

And by 33 & 34 Vict. c. 77, s. 20, no juror is to be liable to any penalty for non-attendance on any jury, unless the sum-

“Any person liable to serve on any jury may be summoned as heretofore, or in the manner following, that is to say, the sheriff or other proper officer may make out a summons and affix the seal of his office thereto, and such summons, having the words ‘jury summons’ legibly written or printed on the same side as the address, may be sent open by the post, prepaid, and directed to the person so required to serve as juror at his place of abode as described in the jurors’ book: which said summons, together with a duplicate indorsed with the name and address of the juror to whom the original summons is directed, shall be taken to the postmaster of any post office where money orders are received or paid, within such hours as shall have been previously agreed upon at such post office, and under such regulations with respect to the registration of such summons and the fee to be paid for such registration (which fee shall in no case exceed twopennee over and above the ordinary rate of postage) as shall from time to time be made by the postmaster-general in that behalf; and in all cases in which such fee shall have been duly paid, the postmaster shall compare the address of the said summons with that of the duplicate, and on being satisfied that they are alike shall forward the summons to its address by the post and shall return the duplicate to the party bringing the same, duly stamped with the stamp of the said post office: and the production by the party who posted such summons of such stamped duplicate shall be evidence of such summons having been delivered at the dwelling-house of the person whose name and address is thereon indorsed, at the place mentioned in such indorsement, on the day on which such summons would, in the ordinary course of post, have been delivered, provided it shall appear that the same was not returned by the post office as undelivered; and any summons sent by the post as before mentioned, and not so returned as undelivered, shall be considered in all respects as duly served; and in the event of any person to whom any summons shall be addressed being ascertained to be dead, or to have permanently left the place to which such summons is addressed, the postmaster or letter-carrier of the place in which the summons shall then be shall indorse thereon the reason of the non-delivery thereof, and forward the same in the usual course of post to the returned letter office in London, in order that it may be returned to the sender: Provided always that when any summons shall be served by post under the provisions of this Act, two additional days shall be allowed for the transmission of such summons by post, over and above the number of days required by law for the service of a summons, before the day on which the juror is required to attend.

(z) 6 Geo. 4, c. 50, s. 38. This was the common law. “Courts inferior to the courts of Westminster may clearly fine and imprison for a contempt, if they are courts of *record*, as the court of quarter sessions, and the court of oyer and terminer. Indeed, it is the constant practice for those courts to fine jurors who do not attend.” *Per* Holroyd, J., in *R. v. Clement* (1821), 4 B. & A. 233.

mons requiring him to attend be duly served six days at least before the day on which he is required to attend, but no longer period than such six days shall in any case be required between the service and such last-mentioned day. By the County Juries Act, 1825, if any officer shall summon a juror less than ten days before the day when he is required to attend, such officer is liable to be fined for his neglect in the discretion of the court (*a*); but now no longer than six days' notice is required (*b*).

Regulations
for
attendance.

The sheriff or other officer, with the consent of the person by whom such precept shall have been issued, is to make regulations as to the attendance of jurors during the time for which they shall be summoned, and in particular as to the days on which and the time during which they are to attend. Such regulations may be sent to any juror, together with the summons requiring him to attend on any jury, and when so sent shall be deemed to be part of such summons (*c*).

Enforcing
fines for non-
attendance in
counties.

Whenever any fine shall be imposed upon any person for not attending as a juror in a county in obedience to a summons in that behalf, it shall not be lawful to estreat the said fine until after the expiration of fourteen days, and in the meantime the proper officer of the court by which such fine was imposed shall forthwith by letter inform the said person of the imposition of such fine, and require him within six days after the date of such letter to forward him an affidavit of the cause, if any, of his non-attendance; and such officer shall, upon the receipt of any such affidavit, submit the same to the said court, or the judge or chairman who presided at the said court at the time when such fine was imposed; and such court, judge or chairman shall have power to remit such fine (*d*).

Exemptions
must be
claimed.

When.

By 33 & 34 Vict. c. 77, s. 12, no person whose name shall be in the jury book as a juror shall be entitled to be excused from attendance on the ground of any disqualification or exemption other than illness, not claimed by him at or before the revision of the list by the justices of the peace, and a notice to that effect shall be printed at the bottom of every jury list.

Fines for non-
attendance in
boroughs.

If any person having been duly summoned to attend on any jury in a borough fails to attend according to the summons, or being thrice called does not answer to his name, or after his appearance wilfully withdraws himself from the court, he shall (unless some reasonable excuse is proved by him to the satisfaction of the court) be liable to pay a fine of

(*a*) 6 Geo. 4, c. 50, s. 43.

(*b*) See *supra*.

(*c*) 33 & 34 Vict. c. 77, s. 21.

(*d*) 25 & 26 Vict. c. 107, s. 12.

such amount as the court thinks fit (*e*) ; and if the person on whom any such fine is imposed refuses to pay it to the person authorized by the court to receive it, the court may, then or at its next sitting by order of the court signed by the clerk of the peace, cause to be levied, by distress and sale of the goods of the person on whom such fine is imposed, the fine, and the reasonable charges of the distress and sale (*f*).

To ensure the due performance of the duty imposed on the various officers, in respect of the selection and summoning of juries, they are made answerable for their neglect in penalties. Thus the clerk of the county council neglecting to cause the proper forms to be printed ; or to provide the jurors' book, and deliver it to the sheriff or under-sheriff ; or to give notice to the sheriff or under-sheriff of any error certified by a justice ; or the failure of the clerk of the peace to deliver to any man who has served on the grand and petty jury at sessions, a certificate of his service on application and payment of 1s. ; or to transmit to the sheriff or under-sheriff a list of the men who have attended and served, will forfeit 50*l.*, half to the king, and the other half, with full costs, to any who will sue in either of the courts at Westminster (*g*). The like penalty is imposed on the clerk of the petty sessions holden for allowing the lists, omitting to give notice of the holding of such session to the parish officers ; and on the sheriff or under-sheriff making an undue alteration in the jurors' book, or refusing to deliver over that book to the succeeding sheriff within ten days after he shall be sworn into office (*h*). Every overseer neglecting (unless prevented by sickness) to assist in making out his list, so that it may not be ready ; or wilfully omitting any proper, or inserting any improper name, or taking any money or reward for omitting or inserting any name whatsoever, or wilfully omitting or inserting a wrong description ; or omitting, in case the forms of returns supplied be insufficient, to apply for more to the delay of the list ; or neglecting to fix a copy of the list, duly signed, and with the subjoined notice, on the principal door of each place of worship ; or refusing to allow to an inhabitant inspection of the list, or a true copy, at any reasonable time within the prescribed three weeks ; or refusing to produce the list at the petty sessions, or to answer questions respecting it there on oath ; or to attend such sessions or an adjournment ; or refusing to allow the petty sessions, or any justice of the peace, on due request, to inspect or make extracts from any poor rate in his custody, for the purpose of correcting the

Penalty on the sheriff and officers for neglect or misconduct in the selection or summoning of jurors, &c.

(*e*) 45 & 46 Vict. c. 50, s. 186 (7). The fine goes to the borough fund : sect. 139.

(*f*) *Ibid.* s. 186 (8). Nothing in the Act is to affect the Juries Act, 1870 : sect. 186 (9).

(*g*) 6 Geo. 4, c. 50, s. 46 ; 25 & 26 Vict. c. 107, s. 10.

(*h*) 6 Geo. 4, c. 50, s. 46.

lists,—is made liable to a like penalty, not more than 10*l.*, nor less than 40*s.*, at the discretion of the convicting justice(*i*). And the justice before whom any parish officer shall be convicted of a wrongful insertion or omission in the list is required to certify the error to the clerk of the county council, who is to correct his own list accordingly, and give notice to the sheriff or under-sheriff, who is to make a similar correction in the jurors' book(*k*).

No man is to be returned to serve at the London sessions who is not a householder or the occupier of a shop, warehouse, counting-house, chambers or office, for the purpose of trade and commerce within the city, having lands, tenements or personal estate of the value of 100*l.*(*l*).

Any juror wilfully and corruptly consenting to the offence of embracery is liable to be indicted, or to an information punishable by fine and imprisonment(*m*).

SECTION 10.

OF COUNSEL AND SOLICITORS.

Right of
accused to
conduct their
own case.

Every man, whether accused of any breach of the law, or seeking to enforce a claim under it, has a natural right to plead his own cause, of which no municipal regulation can deprive him without manifest injustice. All persons, therefore, accused of crime or misdemeanour, and all parties to informations, or appeals, have a right to address the court or jury, as the case may be, for themselves; to examine witnesses in their own behalf; or to cross-examine the witnesses produced against them. In all these cases it is a mere question of discretion, whether a party will conduct his case in person, or entrust it to such advocates as the practice of the court allows him(*n*). And by 6 & 7 Will. 4, c. 114, s. 1, it is

Defence by

(*i*) 6 Geo. 4, c. 50, s. 45.

(*k*) *Ibid.*

(*l*) *Ibid.* s. 50. See this section also as to the preparation of the jury lists in the city of London.

(*m*) 6 Geo. 4, c. 50, s. 61.

(*n*) A defendant cannot delegate to counsel the duty of examining or cross-examining witnesses, and reserve to himself the right of addressing the jury, *per* Abbott, C.J., *R. v. Parkins* (1824), Ry. & M. N. P. C. 166. So, in civil cases, *Shuttlesworth v. Nicolson* (1833), 1 M. & R. 254, and in *Moseati v. Lawson* (1835), 1 M. & R. 454, this division of labour is not allowed, on the ground that it would be derogatory to the bar and otherwise mischievous to allow counsel to make out the facts from the witnesses and afterwards the defendant to state what he chose to the jury; he ought to be in his proper place—at the head of it—and conduct it throughout.

enacted that all persons tried for felonies shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law, or by attorney, in courts where attorneys practise as counsel, thus extending to felonies the right which defendants had always enjoyed in cases of misdemeanour. But an indictment, being preferred at the suit of the crown, although at the instance of an individual, is not considered as a proceeding at the suit of the party prosecuting, so as to entitle him to conduct the case in court further than to tender his own evidence as a witness, and to offer suggestions to the chairman (o). Where, therefore, no advocate appears for the prosecution, no address for the prosecution is made to the jury, but the witnesses for the prosecution are examined by the chairman.

counsel or attorney in felonies.

In prosecutions party prosecuting cannot conduct his own case in court.

The advocates at county sessions, who, by the practice of the court, are entitled to take upon them the causes of others, and to prosecute for the crown, are barristers and solicitors. Where a sufficient number of barristers attend, it is usual to give them sole audience, and solicitors are consequently not

Right of sole and pre-audience in the bar.

(o) This was distinctly laid down by Lord Tenterden, in *R. v. Stoddart*, tried at Guildhall, Oct. 16, 1819. That case was an indictment for libel, and the prosecutor, Mr. H. Hunt, appeared in person; when the Lord Chief Justice made the following observations as to the course to be pursued:—"If it be *your intention to address the jury*, it is a course which you will not be permitted to pursue. It has been determined by all the judges of the Court of King's Bench, and that determination has been publicly expressed on more than one occasion, together with the concurrence of many of the other judges, that a prosecution by indictment is not, in point of law, the suit of an individual. If any individual seeks redress—personal redress for personal injury—the course that he is to pursue is to bring an action for damages. If, instead of electing to bring his action for the redress of a personal injury, he thinks fit to put the law in motion *in the name of the king*, for the sake of public justice it is not *his* suit, but it is the suit of *his majesty*. Where a person, therefore, chooses to proceed by indictment, he has no right to address the jury, unless he is a gentleman at the bar. That opinion has been solemnly pronounced by all the judges of the Court of King's Bench. We have at every assizes, and under every commission of gaol delivery in London, at *every court of quarter sessions* holden throughout the country, a great number of prosecutions, instituted certainly by private individuals, in which the name of his majesty is used; but in none of them is it ever thought that the person prosecuting has a right to address the jury. The course taken on every occasion of a criminal prosecution is, where there are depositions, that the judge refers to them, and examines the witnesses one by one, according to these depositions. Where there are no depositions, as in cases of this description, it has been usual for the judge to consult the person prosecuting as to the manner of bringing his case before the court, and as to the witnesses proper to be examined. That is the way in which justice is administered in such cases, and that is the course of proceeding I mean to adopt on the present occasion. Mr. Hunt will communicate with me, and give me the names of his witnesses. If he is disposed to proceed in that way, it shall be done. This is the only course I shall allow; and if you do not choose to have justice administered in your case according to the ordinary and established rules and opinions of the judges of the land, the record must be withdrawn." *Dick. Q. S.* 6th ed. p. 152.

heard in their presence. Where members of the bar do not attend, as in some distant counties and many boroughs, it is usual to hear solicitors as advocates; and though it may be doubted whether in strictness they are entitled to address the jury when prosecuting the indictments, it is customary, and certainly convenient, to allow them that privilege. In cases where, as in Cornwall, counsel have not been accustomed to attend, but three or more barristers wish to do so, it is usual for them to intimate their desire to the chairman or recorder, and to request that they may have the pre-audience due to their station in the profession; and if this request is granted, as it ought to be, solicitors cannot be afterwards heard in their presence, unless so many of those who attend should be retained on one side as not to leave a choice of counsel to the defendant.

Upon such a request being made the quarter sessions ordered that pre-audience be granted at all times when four barristers should be present. This order was removed by *certiorari*, but the court refused to quash it, because they would not interfere with the discretion of the sessions in such a matter as regulating their own practice where their discretion seemed to be exercised in a sound manner (*p*).

What counsel
attend.

All barristers may attend and practise at sessions; but it was not usual for serjeants-at-law to appear there, nor is it now usual for King's counsel to do so unless specially retained. Barristers not called within the bar as his majesty's counsel, or by patent of precedency, and not being members or officers of the court, as justices, clerk or deputy clerk of the peace, &c., may practise there with propriety. Their seniority, if called to the bar on the same day, depends on the dates of their admission as entered in the books of the inn of court of which either or both are members (*q*).

Retainers to
counsel—
practice as to.

It may be convenient here to allude to a point of practice which is probably more in question where a limited number of the bar are in attendance than elsewhere, namely, that where it is sought to retain the services of a particular barrister a retainer to have a binding effect must be accompanied by the payment of the retaining fee; and in default, that a subsequent retainer in point of time would, if tendered with the retaining fee, be entitled to displace the prior incomplete one.

Solicitors

The practice of solicitors at sessions is either in the joint

(*p*) *Ex parte Evans* (1846), 9 Q. B. 279; sub nom. *R. v. Justices of Denbighshire*, 15 L. J. Q. B. 335. The affidavit upon which the rule was moved in this case stated that previously to the making of the order (*i.e.* 1846) no barristers-at-law had ever attended or practised at any court of quarter sessions in the county of Denbigh, except upon a special retainer, nor, as the deponent had heard and believed, at any court of quarter sessions in the principality of Wales, except upon a special retainer.

(*q*) 6 C. & P. 637, n. Case of Abbott, afterwards C. J., and Peake, afterwards Serjt.

characters of advocates and solicitors, where the bar do not attend, or simply as solicitors, advising and assisting their clients, and instructing counsel. In *borough* sessions Lord Denman has intimated that barristers have pre-audience, but not exclusive audience. How far a barrister may, merely as such, *insist*, without the sanction of the bench, on his right of pre-audience in courts of sessions where solicitors *alone* have been accustomed to practise, is a question of some difficulty; but is very unlikely, it may be hoped, to be raised in practice.

The right to practise at the sessions as a solicitor is strictly confined to those who have been admitted and remain duly enrolled (*r*), and it is an indictable misdemeanour to practise as a solicitor without being admitted and enrolled (*s*). If he is not certificated at the time of practising, he cannot recover his bill (*t*); and if at the time of acting as solicitor in any proceedings he be not admitted and enrolled, he is guilty of a contempt of the court wherein such proceedings are (*u*), and shall, in addition to other penalties and forfeitures, pay for every such offence 50*l.*, recoverable by a penal action to be brought in the name of the Law Society with the sanction of the attorney-general (*u*).

No solicitor, who has been struck off the rolls of the courts above, can be permitted to practise in the quarter session of the peace.

Though persons acting as solicitors in the court of quarter session, without being admitted and enrolled and duly qualified, cannot, as we have seen, recover any compensation for their services, and are, if not upon the roll, liable to be punished as before stated, yet persons who are unqualified and irresponsible occasionally obtain practice there to the great injury of those who are induced to employ them, and of others against whom they may employ the law as the engine of petty oppression. The bench, therefore, will always confer benefit on the suitors by repressing such attempts; and the members of the bar only perform the duty they owe to the court in assisting to detect them. By the Solicitors Act, 1874 (37 & 38 Vict. c. 68), s. 12, any person who wilfully and falsely pretends to be, or takes or uses any name, title, addition or description implying that he is duly qualified to act as solicitor, or that he is recognised by law as so qualified, shall be guilty of an offence under this Act, and be liable to a penalty not exceeding 10*l.* for each such offence (*y*).

(*r*) 6 & 7 Vict. c. 73, s. 2; 23 & 24 Vict. c. 127, s. 26.

(*s*) *R. v. Buchanan* (1846). 15 L. J. Q. B. 227.

(*t*) 6 Vict. c. 73, s. 26; 23 & 24 Vict. c. 127, s. 26; 37 & 38 Vict. c. 68, s. 12.

(*u*) 23 & 24 Vict. c. 127, s. 26.

(*y*) Offences against this Act are to be prosecuted before courts of summary jurisdiction: sect. 12. As to solicitors permitting unqualified persons to practise in their names or acting as clerks to or partners with such persons, see 6 & 7 Vict. c. 73, s. 32.

CHAPTER III.

OF THE FUNCTIONS OF THE GRAND JURY AND THE
FINDING OF BILLS.

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SECTION 1.

OF THE OPENING OF THE COURT—CALLING THE GRAND JURY—
SWEARING AND CHARGING THEM.

Proclamation
of sessions in
counties.

THE session is usually proclaimed by the bailiff in the follow-
ing terms:—

O yes! O yes! O yes! (a) The King's justices do strictly
charge and command all manner of persons to keep silence
while the King's commission of the peace for this county of
is openly read, upon pain of imprisonment.

Then the commission and the King's proclamation against
vice, &c. ought to be read by the clerk of the peace. It is
also the duty of the clerk of the peace to read the Riot Act
(1 Geo. 1, st. 2, c. 5), which, by sect. 7, is required to be
openly read at every quarter sessions; but it is believed that
this enactment is generally disregarded.

In former times certain other statutes, which have now
been repealed, were required to be read at sessions. These
were principally the following:—5 Eliz. c. 1, against popery;
30 Chas. 2, c. 3, as to burying in woollen; 11 & 12 Will. 3,
c. 15, as to ale measures; 9 Geo. 1, c. 22 (The Black Act);
the foregoing were required to be read at every quarter
session; 4 & 5 W. & M. c. 24; 7 & 8 Will. 3, c. 32; 3 & 4 A.
c. 18; 3 Geo. 2, c. 25, concerning jurors, which were to be

(a) A manifest corruption of Oyez! Oyez! Oyez!

read at Midsummer Sessions; and 2 Geo. 2, c. 24, for preventing bribery and corruption in the election of members of parliament, which was to be read at every Easter Sessions. The persons who attend to take any oaths are next called, and the oaths administered by the clerk of the peace.

The clerk of the peace, as well in boroughs as in counties, next proceeds to call the names of those who are returned to serve on the grand jury; whose qualifications at quarter sessions in counties, as well as boroughs, are now, as we have already seen, the same with those of the petty jurors (*b*). If any of the parties so called are aliens who have not been domiciled in England or Wales for ten years, or are not in other respects duly qualified (33 & 34 Vict. c. 77, s. 8), or outlaws, even on civil process; or attainted of treason or felony; or convicted of any infamous crime; or improperly returned; a prisoner, or party bound to answer a charge, may, it has been said, challenge them before he is indicted for cause; or if he discover it after a bill has been found against him, may plead it in avoidance of the finding (*c*). A juror who has been sworn may be dismissed, on the discovery that he is an improper person (*d*). On the other hand, if any of the parties summoned have any claim of exemption by law or courtesy, they must now submit their claim to the chairman or recorder. In practice it is not uncommon, and may be discreet and proper, when the names are called over, for the court to direct the names of all those to be omitted who reside in a particular district, in which matter of prosecution has arisen, calculated to excite feelings in the inhabitants inconsistent with the calm administration of impartial justice.

The number called and sworn, or affirmed (*e*), on the grand inquest must not be less than twelve, nor more than twenty-three: not less than twelve, because every bill must be found by twelve at least (*f*); not more than twenty-three, for if

Calling the grand jury.
Challenge to grand jury.

Number sworn or affirmed.

(*b*) *Ante*, p. 94.

(*c*) Hawk. bk. 2, c. 25, s. 16; 2 Hale, 155; but this authority is based upon the purview of the statutes 11 Hen. 4, c. 9, and 3 Hen. 8, c. 12, now repealed by 6 Geo. 4, c. 50, which contains no substituted enactment to the same effect.

(*d*) Lamb. 400.

(*e*) 51 & 52 Vict. c. 46.

(*f*) C. Eliz. 654; 2 Burr. 1088; 3 Inst. 30; 2 Inst. 387; Co. Litt. 156; Hawkins, P. C. 295, sect. 16.

The learned author of this work, following Dickinson, stated in the first edition that the grand jury ought not to consist of less than thirteen (Fritchard, Q. S. 1st ed. p. 102; Dick. Q. S. 6th ed. p. 172, giving the reason "because every bill must be found by twelve at least." In view of the fact that a bill of indictment found by twelve grand jurors would undoubtedly be good, and that neither Dickinson nor the learned author of the first edition of this work cites any authority in support of the suggested propriety of at least thirteen grand jurors being sworn, and that the rule suggested goes beyond the reason given for it, the editors of

a number amounting to two full juries were sworn, there might be an equal division (*g*). At sessions, after sixteen or seventeen names have been called, and the parties have appeared, it is not unusual to consider the inquest as complete, and to dismiss all others attending on their summons.

When the grand jurors who remain to serve have taken their places in the box assigned to them, and have named their foreman, the following oath is administered by the clerk of the peace to their foreman:—

Oath of foreman.

You, as foreman of this inquest, shall diligently inquire, and true presentment make, of all such matters and things as shall be given you in charge. The King's counsel, your fellows', and your own, you shall keep secret. You shall present no man for envy, hatred, or malice; neither shall you leave any man unrepresented for fear, favour, or affection, or hope of reward; but you shall present all things truly as they come to your knowledge, according to the best of your understanding.

So help you God.

Then the rest of the grand jury, by three at a time, in order, are sworn in the following manner:—

Oath of grand jury.

The same oath which your foreman hath taken on his part, you, and every of you, shall well and truly observe and keep on your parts.

So help you God.

If the grand juror affirms, his affirmation will be to the same effect (*h*).

When the grand jury are sworn, or affirmed, as the case may be, it becomes the duty of the chairman of the session, or recorder, to deliver his charge to them.

Charge to the grand jury.

It should consist of remarks tending to explain and elucidate any cases which the calendar may disclose, or which may be known to the court as likely to be presented, and to require more than ordinary attention, either from the complicated nature of the facts, or from the law applicable to them happening to be of recent enactment or of unfrequent use. In cases, for example, where the distinction between principal and accessory; between theft and embezzlement; or between larceny and breach of trust, or obtaining money under false pretences, is likely to arise on the matters which will be submitted to the grand jury, a popular explanation of the law on

the present edition have taken upon themselves the responsibility of altering "thirteen" to "twelve" in the text.

It is, however, a convenient practice to swear more than twelve, and in that sense it is correct to say that the grand jury ought to consist of not less than thirteen.

(*g*) See *R. v. Marsh* (1837), 6 A. & E. 237. But if a bill is found by a grand jury of more than twenty-three, and the prisoner pleads and is found guilty, the indictment will not be quashed on motion, and he will be left to his writ of error; no affidavit by a grand jurymen of what passed in the grand jury room on the subject of a bill will be received.

(*h*) 51 & 52 Vict. c. 46.

these subjects will facilitate their labours, and give to them their proper aim. So, if the nature of the depositions requires it, he should point out to them that the crime of simple larceny is included in that of larceny in a dwelling-house, or that on a bill found for any felony or misdemeanour there may be a conviction of an attempt to commit such offences respectively, or that a charge of indecent assault includes one of a common assault, and such like points of law. When parties have been committed or held to bail on charges arising upon any recent Act of Parliament, it becomes absolutely necessary that the statute should be stated and explained by the chairman; and even where no such case is presented by the calendar, it may be expedient for him to take this opportunity of publicly stating and expounding any new penal law, or modification of the former law, which it may be desirable should be generally understood; and the more especially since the practice of requiring statutes to be read at the sessions has been disused by the legislature. In the exercise of a sound discretion, he may also advert to general topics presented by the calendar—to the prevalence of crime in general, or of any particular class of crime—to the causes which may induce it, and the means which may be applied by way of prevention. He may properly take occasion to discourage petty and frivolous prosecutions, as indictments for trifling assaults, which only serve to prolong animosities, to unsettle habits of industry, and to burden the parties with fruitless expenses. His local knowledge will enable him to expose any prevalent mistake which may operate to the public evil; as those which sometimes exist as to the administration of the laws; and, in times of excitement, to suggest considerations which may tend to preserve peace, order and good-humour among all classes of his neighbours.

SECTION 2.

FINDING OF BILLS—PRELIMINARY CONDITIONS TO JURISDICTION OF GRAND JURY OVER CERTAIN INDICTMENTS.

The grand jury, being sworn, or affirmed, as the case may be, proceed in a private room to consider the bills brought before them. Although sworn to secrecy, they may, in cases of difficulty, allow the prosecutor or his solicitor to assist them by marshalling the evidence and examining the witnesses. If any doubts occur on points of law, or with respect to the propriety of admitting any part of the evidence offered to them, they should come into court and pray the advice of the chairman or recorder. A majority consisting of twelve at the least is necessary to the finding of the bill, and to prevent its

The finding of bills by the grand jury.

being thrown out (*i*). They should not throw out a bill on the ground of the supposed insanity of the prisoner (*k*). The court will not act upon the affidavit of a grand jurymen as to what passed before the grand jury on a motion to quash an indictment found by them (*l*).

The duty of the grand jury in determining on the finding or rejecting of bills is to consider whether there is a fair and reasonable ground for requiring the party accused to answer the charge made against him. In general they hear only the case of the prosecutor; as the defendant, although aware of the intention to prefer a bill against him, as he now usually is, has no right to appear before them by himself or by attorney, and to urge any argument or adduce any evidence on his own behalf. There seems no objection, however, if anything should appear doubtful or ambiguous, on the case as presented to them, which is capable of being removed, to their sending for any one who may be willing to attend, or for any document which may assist them in arriving at the proper conclusion.

Duties on
grand jurors
as to finding
bills.

It is true that they are not the final judges of the charge, and that they do not absolutely pronounce even an opinion on the guilt or innocence of the party accused; but still their duty, especially when there has been no previous hearing before a magistrate, in which case the charge may, and probably will, remain undetermined till the ensuing sessions, is of grave and serious import. They should remember that, in such a case, on their finding, the defendant, without any sifting of the evidence by justices, is liable to be apprehended, and compelled to find bail, or be imprisoned if he cannot obtain sureties; that he must, in order effectually to defend himself, incur expense for which, however innocent he may ultimately be found, the law affords him no recompense, unless through the difficult and uncertain course of an action, and then only when he can show the charge to be malicious as well as groundless; and that the character and fortunes of an honourable man may, for a time at least, be deeply affected in the opinion of the many who want moral discrimination to separate charge from proof, and to believe in the evidence of the life of the accused against the breath of an accuser. These considerations should induce a grand juror to pause, where there has been no committal by a magistrate, before he sanctions an accusation which leads directly to such consequences; and to weigh the evidence before him with the more scrupulous attention; because it is on one side only, and unsifted by the party against whom it is given. And again, when the defendant is, in truth, guilty, an injury may be

(*i*) *R. v. Marsh* (1837), 6 A. & E. 236.

(*k*) *R. v. Hodges* (1838), 8 C. & P. 195, *per Alderson, J.*

(*l*) *R. v. Marsh, ubi sup.*

done to the public by finding a bill on insufficient evidence; because it will bring the case prematurely to a final trial; and if an acquittal once be pronounced on an indictment, valid in form, no proof of guilt subsequently discovered, however decisive, can render the criminal again amenable to justice. The grand jury ought, therefore, to be satisfied on the means they have of forming a judgment, at best but imperfect, that there is a strong presumption of guilt in the party charged, before they find "a true bill" against him.

The cases in which grand juries at sessions have most need of caution are those of conspiracy, and of attempts to commit rape, or indecent assaults. Indictments of the first class are peculiarly liable to be perverted to indirect objects, as from the great latitude both of charge and proof, they are more calculated to excite apprehension, even in parties who are slightly and blamelessly connected with the transaction to which a criminal aspect is given. The other charges are always to be looked at with great anxiety, since in one, the mere imputation is ruin, and the other is often dictated by revenge; and both are easy to make and difficult to repel. In these cases, it may be safely adopted as a rule by grand juries, that no bill should ever be found, except on a case which, if *unanswered*, would probably lead to a conviction; and therefore no such bill should be returned "true" on the testimony of the accusing party, unless rendered probable by immediate complaint, or attendant circumstances, or confirmed by the evidence of others: for on such unsupported testimony no satisfactory conviction can be had; and a trial of this kind, which terminates in an acquittal, produces nothing in the way of benefit to countervail the mischievous operation of its details on public morals.

At the conclusion of the charge the parties who have bills to present should go with them before the grand jury, and those who are bound to prosecute and give evidence should be called and should have their bills ready prepared, or go to the office of the clerk of the peace to get them prepared there for them. The bills are engrossed on parchment, with the names of the witnesses written at the back (*m*). The witnesses are then called and sent with the bills before the grand jury, and if parties bound to prosecute or to give evidence are not in attendance so to do before the grand jury are discharged, their recognizances may be forfeited, subject to the power of the prosecutor, where an offence is committed within the county of a city or town corporate, except in certain exempted places, upon giving notice and entering into further recognizances,

Attendance of
prosecutors
and witnesses
before the
grand jury.

(*m*) 19 & 20 Viet. c. 54, s. 1. The usual course is to arrange the names of the witnesses in the order in which they were called before the committing magistrates, in cases in which there has been a committal for trial; in other cases in order of importance, the most important witness being named first, but this is merely a matter of practice.

to go before the jury of the next adjoining county under 38 Geo. 3, c. 52.

Examining
and swearing
of witnesses
before the
grand jury.

The foreman, or member acting on behalf of the foreman, of every grand jury in England and Wales is authorized and required to administer an oath or affirmation, where by law an affirmation is allowed in lieu of an oath, to all persons whomsoever who shall appear before such grand jury to give evidence in support of any bill of indictment; and all such persons attending before any grand jury to give evidence may be sworn and examined upon oath by such grand jury touching the matters in question⁽ⁿ⁾. And every person taking any oath or affirmation in support of any bill of indictment who shall wilfully swear or affirm falsely shall be deemed guilty of perjury^(o). And the name of every witness examined or intended to be examined shall be indorsed on such bill of indictment. And the foreman of such grand jury shall write his initials against the name of each witness so sworn and examined touching such bill of indictment^(p). And since that Act it is not necessary for any person to take an oath in open court, in order to qualify such person to give evidence before any grand jury, as was the case formerly^(q).

Indorsing
initially
names of
witnesses.

As to bill
found on
improper
evidence.

It has been doubted whether if evidence were given before the grand jury which was not rightly submitted to them, whereupon they found a true bill, and a conviction took place, the conviction would be invalidated^(q); and in a case which arose under the old law, when the practice was for the witnesses to be sworn on oath in open court before being examined by the grand jury, and this oath was neglected, and the prisoner convicted, upon the point being reserved for the consideration of the judges, they considered that, as a matter of discretion, the better course was to recommend a pardon for the prisoner, without deciding upon the validity of the objection, and the prisoner was pardoned accordingly^(r). But having regard to the indubitable power of a grand jury to present any man of their own knowledge, without receiving any evidence whatever, it is difficult to see what foundation there can be for this doubt: and in a later case, tried at the central criminal court in 1842, Gurney, B. and Wightman, J. were both of opinion that a suggested irregularity in the mode of swearing the witnesses in open court was a matter which they ought not to inquire into, for that an error in that particular would not vitiate the indictment^(s). The deposition of a witness, taken before the magistrates, who is dead or so

Reading de-
positions in
absence of
witnesses.

(n) 19 & 20 Viet. c. 54, s. 1.

(o) *Ibid.*

(p) *Ibid.* s. 2.

(q) See *R. v. Clements* (1851), 20 L. J. M. C. 193.

(r) *R. v. Dickenson* (1819), R. & Ry. 401.

(s) *R. v. Russell* (1842), C. & M. 247.

ill as not to be able to travel, may be read in evidence before the grand jury under 11 & 12 Vict. c. 42, s. 17, upon proof of such facts, and that such deposition was taken in the presence of the accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, and that the deposition purports to be signed by the justice by or before whom the same purports to have been taken (*t*). In that case the proof of the illness of the witness and the other facts to make the deposition admissible were stated before the court (*u*), and the names of the witnesses to prove them put on the back of the indictment and afterwards proved on the trial.

It having been found that in certain cases the presenting of bills to grand juries, and their finding of them without any check, was perverted to indirect objects, such as the extorting of money, or revenge, and was in other respects unsatisfactory, the legislature has interfered and enacted (*v*) that no bill of indictment for any of the offences following, viz. :—

Conditions precedent to the finding of certain bills.

Bills of indictment not to be presented in certain cases except under condition.

- Perjury (*x*) ;
- Subornation of perjury (*x*) ;
- Conspiracy (*x*) ;
- Obtaining money or other property by false pretences (*y*) ;
- Keeping a gambling-house ;
- Keeping a disorderly house ;
- Any indecent assault ;
- Any misdemeanour under the second part of the Debtors Act, 1869, for the Punishment of Fraudulent Debtors (*z*) ;
- All libels, or alleged libels (apparently including blasphemous, seditious and obscene libels) (*a*) ;
- All offences punishable on indictment under the Merchandise Marks Act, 1887 (*b*) ;

shall be presented to or found by any grand jury, unless (1) the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, (2) or unless the person accused has been committed to or detained in custody,

(*t*) *R. v. Clements* (1851), 20 L. J. M. C. 193.

(*u*) See, as to the admissibility of depositions as evidence, *post*, tit. "Documentary Evidence, Depositions."

(*v*) 22 & 23 Vict. c. 17, s. 1.

(*x*) Perjury and subornation of perjury and conspiracies of certain kinds are not triable at quarter sessions. See *ante*, p. 11.

(*y*) The statute does not apply to an attempt to obtain, &c.: *R. v. Burton* (1875), 13 Cox, 71 (C. C. R.).

(*z*) 32 & 33 Vict. c. 62, s. 18; as modified by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71).

(*a*) 44 & 45 Vict. c. 60, s. 6.

(*b*) 50 & 51 Vict. c. 28, s. 13. The Vexatious Indictments Acts also apply to misdemeanours under the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), but these misdemeanours are not triable at sessions: 48 & 49 Vict. c. 69, s. 17.

or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, (3) or unless such indictment for such offence, if charged to have been committed in England, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminster, or of his Majesty's attorney-general or solicitor-general for England, (4) or unless such indictment for such offence, if charged to have been committed in Ireland, be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law in Dublin, or of his Majesty's attorney-general or solicitor-general for Ireland, (5) or (in the case of an indictment for perjury) by the direction of any court, judge or public functionary authorised (c) to direct a prosecution for perjury.

Not to prevent the presentment of a bill containing a count or counts for any of such offences in certain cases.

By 30 & 31 Viet. c. 35, s. 1, the above provisions shall not extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment containing a count or counts for any of the offences mentioned in the said Act, if such count or counts be such as may now be lawfully joined with the rest of such bill of indictment, and if the same count or counts be founded (in the opinion of the court in or before which the same bill of indictment be preferred) upon the facts or evidence disclosed in any examinations or depositions taken before a justice of the peace in the presence of the person accused, or proposed to be accused, by such bill of indictment, and transmitted or delivered to such court in due course of law, and nothing in the said Act shall extend or be applicable to prevent the presentment to or finding by a grand jury of any bill of indictment, if such bill be presented to the grand jury with the consent of the court in or before which the same may be preferred.

Indictment not complying with 22 & 23 Viet. c. 17, s. 1, and 30 & 31 Viet. c. 35, s. 1.

The indictment in the above cases respectively need not state that the conditions imposed by the statute have been complied with (d), but the statute in effect amounts to a direction to the officer of the court not to allow a bill to be presented unless the conditions have been fulfilled (e).

If a bill has been presented and found without a compliance with such conditions in fact, it would seem that the court, upon an application on affidavit of the fact, or proof on oath, would have jurisdiction to quash the indictment, though after plea pleaded (f); or if the indictment consists of several counts, and with respect to the charges in some of them the Act has been complied with, and with respect to others not, the court may quash such counts as are not justified, and try the case on the

(c) 14 & 15 Viet. c. 100, s. 19.

(d) *Knowlden v. R.* (1864), 33 L. J. M. C. 219; *R. v. Heane* (1864) *ibid.* 115. See *R. v. Gregory* (1845), 7 Q. B. 274.

(e) *Ibid.*

(f) See *R. v. Heane, sup.*; *Knowlden v. R., sup.*

rest (*g*); and in any case which is clearly within the statute this would appear to be the most convenient course, and was the one adopted by Crompton, J., at Monmouth assizes (*h*). Another course would be to plead to the jurisdiction of the court, as was also suggested in *Knowlden v. R.*, *ubi sup.*, and after conviction probably error in fact would lie (*i*). Where the indictment is preferred by the direction of the judge, the materials upon which he acts are in his discretion, *e.g.*, he may choose to act on a newspaper report, and the direction may be given *ex parte* (*k*).

Where an indictment was found by the grand jury containing two counts, one of which charged the obtaining of a shawl by false pretences on a certain day, on which charge alone the prisoner was committed, and the second count charged the obtaining another shawl on a subsequent day, and no order of the court had been obtained for the joining of the second count, and an application to quash the second count before plea was refused, and the prisoner was tried on evidence given on both counts, and was convicted on both counts: on a case reserved, the Court of Crown Cases held that the second count ought to have been quashed, and not the whole indictment, but quashed the conviction altogether, because the first count alone being triable, evidence was given which was inadmissible on that count (*l*).

But in order to preserve the right of any person to prefer a bill who is willing to show the *bona fides* of the proceeding by binding himself to prosecute and pay the costs of the defendant in case of an acquittal if the court should think fit so to direct, it is enacted by 22 & 23 Vict. c. 17, s. 2, that where any charge or complaint shall be made before any one or more of his Majesty's justices of the peace that any person has committed any of the offences aforesaid within the jurisdiction of such justice, and such justice shall refuse to commit or to bail the person charged with such offence to be tried for the same, then, in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice, and he is hereby required, to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information or depositions, if any, to the court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence.

Justices must bind over a prosecutor by recognizance who desires to indict.

And in such a case, by 30 & 31 Vict. c. 35, s. 2, whenever

(*g*) *R. v. Fuidge* (1864), 33 L. J. M. C. 74.

(*h*) See *Knowlden v. R.*, *ubi sup.*

(*i*) *Ibid.*

(*k*) *R. v. Bray* (1862), 32 L. J. M. C. 11.

(*l*) *R. v. Fuidge* (1864), 33 L. J. M. C. 74. But this must now be taken subject to the 30 & 31 Vict. c. 35, s. 1, *ante*, p. 112.

Costs on acquittal where party bound over to prosecute at his own request.

any bill of indictment shall be referred to any grand jury under the provisions of the above Act, against any person who has not been committed to or detained in custody or bound by recognizance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court before which such indictment shall be tried, in its discretion, to direct and order that the prosecutor or other person by or at whose instance such indictment shall have been preferred shall pay unto the accused person the just and reasonable costs, charges and expenses of such accused person and his witnesses (if any), caused or occasioned by or consequent upon the preferring of such bill of indictment, to be taxed by the proper officer of the court; and upon non-payment of such costs, charges and expenses within one calendar month after the date of such direction and order, it shall be lawful for any of the superior courts of law at Westminster, or any judge thereof, or for the justices and judges of the central criminal court (if the bill of indictment has been preferred in that court) to issue against the person on whom such order is made such and the like writ or writs, process or processes as may now be lawfully issued by any of the said superior courts for enforcing judgments thereof.

Where a prosecutor has required magistrates to take his recognizances under this section, if he does not go on with the prosecution he must have his recognizances forfeited, and will not be allowed to move to have his recognizances discharged, as such a course would defeat the object of the statute (*m*).

SECTION 3.

OF THE PROCESS TO COMPEL THE ATTENDANCE AND APPEARANCE OF PROSECUTORS AND THEIR WITNESSES: (1) SUCH AS ARE BOUND OVER TO APPEAR; (2) SUCH AS ARE NOT SO BOUND—PRIVILEGE FROM ARREST WHEN IN ATTENDANCE.

Process to compel attendance of prosecutor and witnesses to prosecute or give evidence.

When a charge is made before a magistrate or before a coroner acting as a conservator of the peace, in a matter within his jurisdiction, he may bind over the party making the charge to appear at the sessions to prosecute and give evidence, and also all who can give material evidence: and, on their obstinate refusal, may commit them for their contempt therein.

(*m*) *R. v. Hargreaves* (1861), 2 F. & F. 790.

The process to compel appearance before the justices in petty sessions is not treated of here, but, in addition to the powers conferred by the commission, in all cases where any person shall appear before any justice or justices of the peace charged with any indictable offence, the justice or justices having taken the depositions of the witnesses in writing (*n*), such justice or justices before whom any such witness shall be examined as aforesaid may bind by recognizance (*o*) the prosecutor and every such witness to appear at the court of general or quarter sessions of the peace at which the accused is to be tried, then and there to prosecute, or to prosecute and give evidence, or to give evidence, as the case may be, against the party accused, which said recognizance shall particularly specify the profession, art, mystery or trade of every such person entering into or acknowledging the same, together with his christian and surname, and the parish, township or place of his residence; and if his residence be in a city, town or borough, the recognizance shall also specify the name of the street and the number, if any, of the house in which he resides, and whether he is owner or tenant thereof or a lodger therein.

Binding prosecutor and witnesses.

A married woman was, at common law, incapable of entering into a recognizance by reason of her inability to contract. Accordingly, the course usually pursued, where a married woman was a material witness, was to bind over her husband, or some other competent person, as surety for her appearance, but if when before the committing justice she altogether refused to appear at the sessions, and to find sureties for such appearance, and her appearance was essential to the conviction of an offender, she might be committed (*p*). The Married Women's Property Acts, 1882 (45 & 46 Vict. c. 76), and 1893 (56 & 57 Vict. c. 63), have now enabled married women to contract, but only so as to bind any separate property which they may be entitled to at the date of the contract, or which they may thereafter acquire, and which is not subject to a restraint upon anticipation or alienation. They cannot render themselves liable to be taken in execution upon process to enforce their contracts (*q*). In the result it will probably be generally found convenient to adopt the practice which was observed before these Acts were passed. Infancy seems no objection to being thus bound (*r*).

When the recognizance has been duly acknowledged by the person entering into the same, it shall be subscribed by the justice or justices before whom the same shall be acknow-

(*n*) Under 11 & 12 Vict. c. 42, s. 17.

(*o*) 11 & 12 Vict. c. 42, s. 1.

(*p*) *Bennett v. Watson* (1814), 3 M. & S. 1, and see now 11 & 12 Vict. c. 42, s. 20.

(*q*) *Scott v. Morley* (1887), 20 Q. B. D. 120.

(*r*) *Ex parte Williams* (1824), M'Clell. 493.

ledged, and a notice thereof signed by the said justice or justices shall at the same time be given to the person bound thereby; and the several recognizances so taken, together with the written information (if any), the depositions, the statement of the accused, and the recognizance of bail (if any), in every such case shall be delivered by the justice or justices, or he or they shall cause the same to be delivered to the proper officer of the court in which the trial is to be had, before or at the opening of the said court on the first day of the sitting thereof, or at such other time as the judge, recorder or justice who is to preside in such court at the said trial shall order and appoint (s).

Recognizance to prosecute or give Evidence.

Form of Be it remembered, that on the day of , in the year of our
recognizance. Lord , C. D., of , in the township of , in the said
county, farmer [or C. D., of No. 2, street, in the parish of ,
in the borough of , surgeon, of which said house he is tenant (t)],
personally came before me, one of his Majesty's justices of the peace for
the said county, and acknowledged himself to owe to our sovereign lord
the king the sum of l., good and lawful money of Great Britain,
to be made and levied of his goods and chattels, lands and tenements, to
the use of our said lord the king, his heirs and successors, if he the said
C. D. fail in the condition indorsed. Taken and acknowledged the day
and year first above mentioned at , before me.

Condition to prosecute.

The condition of the within-written recognizance is such that whereas one A. B. was this day charged before me, J. S., justice of the peace within mentioned, for that [*&c. as in the caption of the depositions*], if therefore he the said C. D. shall appear at the next court of general quarter sessions of the peace to be holden in and for the (county) of *, and there prefer or cause to be preferred a bill of indictment for the offence aforesaid against the said A. B., and there also duly prosecute such indictment, then the said recognizance to be void or else to stand in full force and virtue.

Condition to prosecute and give Evidence.

Same as in the last form to the asterisk, and then thus—"and there prefer or cause to be preferred a bill of indictment against the said A. B. for the offence aforesaid, and duly prosecute such indictment and give evidence thereon as well to the jurors who shall then inquire of the said offence as also to them who shall pass upon the trial of the said A. B., then the said recognizance to be void, or else to stand in full force and virtue."

(s) 11 & 12 Vict. c. 42, s. 20.

(t) The recognizance must particularly specify the profession, art, mystery or trade of the recognizer, together with his christian and surname, and the parish, township or place of his residence, and if his residence be in a city, town or borough, the recognizance must also particularly specify the name of the street, and the number, if any, of the house in which he resides, and whether he is owner or tenant thereof or a lodger therein. *Ibid.* s. 20.

Condition to give Evidence.

Same as the last form to asterisk, and then thus—"and there to give such evidence as he knoweth upon a bill of indictment to be then and there preferred against the said A. B. for the offence aforesaid, as well to the jurors who shall then inquire of the said offence as also to the jurors who shall pass upon the trial of the said A. B. if the said bill shall be found a true bill, then the said recognizances to be void or else to stand in full force and virtue."

Notice of the said Recognizance to be given to the Prosecutor and his Witnesses.

Take notice, that you, C. D., of _____, are bound in the sum to wit. } of _____, to appear at the next court of general quarter sessions of the peace in and for the county of _____, to be holden at _____, in the said county, and then and there [prosecute and] give evidence against A. B.; and unless you then appear there and [prosecute and] give evidence accordingly, the recognizance entered into by you will be forthwith levied on you. Dated this _____ day of _____, 19 ____.

J. S.

If any such witness as is referred to in sect. 17 shall refuse to enter into or acknowledge such recognizance as aforesaid, it shall be lawful for such justice or justices of the peace, by his or their warrant, to commit him to the common gaol or house of correction for the county, riding, &c. in which the accused party is to be tried, there to be imprisoned and safely kept until after the trial of such accused party, unless in the meantime such witness shall duly enter into such recognizance as aforesaid before some one justice of the peace for the county, riding, &c. in which such gaol or house of correction shall be situate: Provided, nevertheless, that if afterwards, from want of sufficient evidence in that behalf or other cause, the justice or justices before whom such accused party shall have been brought shall not commit him or hold him to bail for the offence with which he is charged, it shall be lawful for the justice or justices, or any other justice or justices of the same county, riding, &c. by his or their order in that behalf, to order and direct the keeper of such common gaol or house of correction where such witness shall be so in custody to discharge him from the same, and such keeper shall thereupon forthwith discharge him accordingly (*u*).

Contumacy of witness.

Lord Preston, being committed by a court of quarter sessions for contempt in refusing to be sworn to give evidence to the grand jury there on an indictment of high treason, was brought by *habeas corpus* into the Court of King's Bench; and Chief Justice Holt said it was a great contempt, and that had he been there he would have fined him, and committed him till he paid the fine; but being otherwise, he was bailed (*x*).

(*u*) 11 & 12 Vict. c. 42, s. 20.

(*x*) *R. v. Lord Preston* (1691), Salk, 278.

Subpœna.

The usual process to bring before the grand jury or court such witnesses as have not been bound by recognizance to appear, whether on the part of the prosecution or of the defendant (*y*), is by *subpœna ad testificandum*; which, whatever may have been the law in former times, is now to be obtained in all cases for either party, from the clerk of the peace, under the seal of the *custos rotulorum*, or from the Crown Office (*z*). This writ, when issued by the clerk of the peace (or clerk of assize at an assize), is at the utmost only compulsory within the county where it is granted, and, therefore, if the witness lives beyond its limits, application must be made to the Crown Office, from whence it may issue to any part of England (*a*). This appears to be still law, notwithstanding that by 45 Geo. 3, c. 92, s. 3, the service of every writ of subpœna upon any person in any one of the *parts* of the United Kingdom requiring the appearance of such person to give evidence in any criminal prosecution in any other of the *parts* of the same (*b*) is made as effectual in law as if the same had been served in that part of the United Kingdom where the person so served is required to appear; and the party disobeying it is liable to punishment by attachment in the Court of King's Bench, as the highest court of criminal jurisdiction, and having power over all others. For that enactment only extends to give to a subpœna having validity throughout either England, Scotland or Ireland, taken generally, the same validity in either of those parts of the United Kingdom; and contemplates such a subpœna as would be enforced by one of the courts having competent jurisdiction to compel the attendance of a witness in any county or place within either of those *parts* (*c*); so that it is by far the more effectual and advisable course to sue out a subpœna from the

(*y*) In prosecutions for misdemeanours the defendant was always entitled to take out subpœnas as of course, but in treason and felony he had no such right, without, as has been said, a special order of the court. But in *Turner's case* (1660) (St. Tr. 995), it was said that the court could not grant the prisoner any precept to bring in his witnesses. But by 7 Will. 3, c. 3, s. 7, all persons accused and indicted for high treason were to be entitled to the like process of the court where they should be tried, to compel their witnesses to appear for them at any such trial or trials, as was usually granted to compel witnesses to appear against them. And it would seem that since 1 Anne, stat. 2, c. 9, which first required witnesses for the defence in cases of felony to be sworn, process has been granted to witnesses for the prisoner in cases of felony as of course. See 2 Hawk. P. C. C. 46, ss. 165, 166, 167.

(*z*) 2 Hale, 282; 2 Hawk. c. 46, ss. 165, 166, 167; 1 Chit. Cr. L. 320, 1st edit.; 1 Ann. c. 9.

(*a*) Cro. Circ. Comp. 9, 21. "The old jurisdiction of counties was local; they were like different kingdoms. There was no jurisdiction, no process out of the county; one county had no jurisdiction over the inhabitants of a distinct county"; *per* Lord Mansfield, 4 Burr. 2511, 2512.

(*b*) Viz., England, Scotland and Ireland: *R. v. Brownell* (1834), 1 A. & E. 598.

(*c*) Viz., England, Scotland and Ireland.

Crown Office, in order to bring the witness within reach of attachment from the Court of King's Bench, in case of his making default in his attendance at the sessions (*d*). For disobedience to a subpoena from quarter sessions is not that manifest contempt of the authority of the Court of King's Bench, which similar neglect of a Crown Office subpoena is, and accordingly that court has not power to punish the witness for disobedience to a subpoena issued by the clerk of the peace (though served within the jurisdiction of the same quarter sessions), either by its general authority, or by virtue of the above statute (*e*); whereas disobedience to its own subpoena issued from the Crown Office will be punished by attachment (*f*). In a case which is of a criminal nature, even in form (*e.g.* indictment for stopping a way), a person present in court, if called as a witness, is bound to be sworn and give evidence, though not subpoenaed (*g*).

*The form of a Subpœna to give evidence before the Grand Jury at the
(Quarter Sessions.*

Edward the Seventh, by the grace of God of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, to A. B., C. D., E. F., and G. H. [*not putting more than four in one subpoena*], greeting: We command you, that all and singular business and excuses being laid aside, you, and every one of you, be, and personally appear in your own proper persons, before our justices assigned to keep the peace in and for our county of _____, and also to hear and determine divers felonies, trespasses, and other misdemeanours, in the said county committed, at the general quarter [*or general*] sessions of the peace, to be holden at _____, in and for the said county, on _____ day, the _____ day of _____, at the hour of _____ in the forenoon of the same day, to testify the truth, and give evidence before the grand inquest touching a bill of indictment to be preferred against _____, in a case of trespass and assault.

Or, if it is to give evidence for the prosecution on the trial of an *indictment*, thus:

On our behalf against _____, in a case of trespass and assault.

(*d*) 2 Nolan, 541, note (4), 4th ed.

(*e*) *Ibid.*; *R. v. Brownell* (1834), 1 A. & E. 598.

(*f*) See *R. v. Ring* (1800), 8 T. R. 585; *R. v. Booth* (1805), Hil. 45 Geo. 3, 2 Nol. P. L. 541, n. The service should take place in time to give the party reasonable notice to attend. Thus service of a subpoena at half-past eleven in the morning, for a cause called on at two o'clock, is not sufficient, though the witness live close to the place of trial: *Barber v. Wood* (1838), 2 M. & R. 172. In *Holme v. Smith* (1815), 1 Marsh. 410, the court refused to attach a witness who resided twenty-four miles from the assize town, where his expenses had not been tendered to him until the evening before the trial, and left the party to his remedy by action. The reasonableness of time must of course be decided with regard to the increased facilities for travelling which now exist.

(*g*) *R. v. Sadler and others* (1830), 4 C. & P. 218, tried by *certiorari* at *nisi prius*, Littledale, J.

If for the defendant, thus :

Between us , in a case of trespass and assault.

Or if the subpoena is to give evidence in an *appeal* against an order of removal, thus :

In a certain appeal now depending between the overseers of the poor of the parish of A. appellants, and the overseers of the poor of the parish of B. respondents, touching and concerning the removal of C. D. from the said parish of B. to the said parish of A.

The close of the subpoena, in either case, is this :

And this you, or any of you, are by no means to omit, under the penalty upon each of you of 100*l.* Witness , at , aforesaid, the day of , in the year of our reign.
Y. Z., Clerk of the Peace.

*Subpœna
duces tecum.*

If the party subpoenaed is supposed to be in possession of any documents necessary to the case of the party on whose behalf he will be called, a special clause, called a *duces tecum*, is to be inserted, requiring him to bring such documents with him.

It is no answer to a rule for an attachment for non-production of a document before petty or quarter sessions on a Crown Office subpoena for the witness to say that he was bound to submit it to examination. He is bound to attend as a witness and bring the paper called for in obedience to the writ, and it is for the judge to decide whether the papers shall be examined or not (*h*); but if he is the officer of a corporation subpoenaed to produce documents in his custody as such officer, it seems he may put forward the orders of such corporation as his masters as an excuse for their non-production (*i*).

Service of
subpœna.

The subpoena is made out by the clerk of the peace, or by the master of the Crown Office, and each of the witnesses must be personally served, either with a copy called a subpoena ticket (*k*), which is now most usual, or with a notice, also showing them the original subpoena or subpoena ticket, in the following form :—

To Mr. A. B.

By virtue of his Majesty's writ of subpoena to you directed, and herewith shown unto you, you are personally to be and appear before his

(*h*) *R. v. Greenaway* (1845), 14 L. J. M. C. 190.

(*i*) The proposition in the text, as to the right of an officer of a corporation to plead the orders of the corporation as an excuse for non-production of documents, is left intact, as representing the opinion of the author of this work. It will be observed that he cites no authority. The present editors entertain some doubt upon the point.

If a clerk in a public office is subpoenaed to produce official documents, his comptroller must be applied to in order to secure their production : *Austen v. Evans* (1841), 9 Dowl. P. C. 408.

(*k*) *Maddison v. Shore* (1697), 5 Mod. 355 ; *Goodwin v. West* (1639), Cro. Car. 522, 540.

Majesty's justices, &c. [pursuing the form of the subpoena, as far as the words "in a case of ;"] and this you are not to omit, under the penalty of 100*l*. Dated this day of , in the year of the reign , &c.

If the witness be confined in any gaol as a prisoner he may be brought up before the sessions to give evidence under one or other of three different statutes. If in *criminal* custody he may be brought up under 16 & 17 Vict. c. 30, s. 9, which empowers the secretary of state or any judge of the King's Bench (now any judge of the High Court), in any case where he may see fit to do so, upon application by affidavit, to issue a warrant or order under his hand for bringing up any prisoner or person confined in any gaol, prison or place under any sentence, or under commitment for trial or otherwise (except under process in any civil action, suit or proceeding) before any court, judge, justice or other judicature, to be examined as a witness in any cause or matter, civil or criminal, or to be inquired of or determined in or before such court, judge, justice or judicature. The other statutes are 44 Geo. 3, c. 102, and 61 & 62 Vict. c. 41 (the Prison Act, 1898), s. 11. The former Act empowers any judge of the old common law courts (now any judge of the High Court) to award a writ of *habeas corpus ad testificandum* for bringing any prisoner or prisoners detained in any gaol or prison before any court of record in England or Wales, to be there examined as a witness, and to testify the truth before such court, or any grand, petit, or other jury, in any cause or causes, matter or matters, civil or criminal whatsoever. This statute applies to cases where the witness is in civil custody as well as to cases where he is in criminal custody (*l*).

Habeas corpus,
or order to
bring up.

The Prison Act, 1898, enacts (sect. 11) that a secretary of state, on proof to his satisfaction that the presence of any prisoner at any place is required in the interest of justice, or for the purpose of any public inquiry, may by writing under his hand order that the prisoner be taken to that place; and for the purposes of this section, the expression "prisoner" includes "any person lawfully confined under any sentence or under commitment for trial or otherwise." This section would therefore appear to apply equally to cases of civil and criminal imprisonment.

If the witness is under any confinement or restraint, other than imprisonment in a prison, the appropriate course would be to sue out a *habeas corpus ad testificandum*.

In order to obtain either a writ of *habeas corpus ad testificandum* under 44 Geo. 3, c. 102, or a judge's order under 16 & 17 Vict. c. 30, s. 9, an affidavit must be made by the party applying, stating the imprisonment of the party, that he

(*l*) 2 Hawkins' P. C., ch. 46, sect. 167, note (*h*).

is a material and necessary witness, that he is willing to attend, that the trial cannot safely be proceeded in without his presence, and that such trial, cause or matter, civil or criminal, is pending, and will be inquired into, tried and determined in the court of record named at a certain time and place; with such other circumstances as may show the necessity for the application. The application either for the writ or for a judge's order should usually be made at chambers. If it be required to bring up a prisoner of war the application should be to the secretary of state (*m*). It is to be served on the person in whose custody the party is detained.

The form of a Writ of Habeas Corpus ad Testificandum to give evidence at the Court of Quarter Sessions.

Edward, &c., to the gaoler of _____, greeting: We command you that you have the body of A. B. detained as it is said in our prison under your custody, under safe and secure conduct, by whatsoever name the said A. B. may be called in the same, before our justices assigned, &c., at the general quarter sessions of the peace, to be holden at _____ in and for the said county, on, &c., then and there to testify the truth, and give evidence on our behalf before the grand inquest, touching a bill of indictment to be preferred against, &c., &c. [*as the case may be*], and immediately after the said A. B. shall have then and there given his testimony before our said justices, to return him the said A. B. to our said prison under safe and secure conduct, and have you then there this writ. Witness _____, in the _____ year of our reign, &c., &c.

Witnesses'
expenses.

The money which is given with subpoenas, to secure the attendance of witnesses at the quarter sessions of the peace, demands but very brief notice. It has been frequently decided, that, in *civil* cases, a witness is not bound to attend in pursuance of a subpoena; unless a tender be made by the party requiring his attendance, sufficient to cover all the reasonable expenses of his journey out and home (*n*). Attendance upon *criminal* prosecutions stands on a different ground. In all cases of felony, and in most cases of misdemeanour, the court to which a prisoner is committed for trial has power, under 7 Geo. 4, c. 64, s. 22, and many more recent statutes which have extended the operation of that statute to cases of misdemeanour, to order payment out of public funds to witnesses appearing on recognizance or subpoena to give evidence, of such sums of money as the court may think reasonable, and sufficient to reimburse such witnesses their expenses, and also to compensate them for their loss of time (*o*); and such expenses are in practice allowed as a matter of course, unless

(*m*) *Furley v. Neurnham* (1780), Doug. 419.

(*n*) *Fuller v. Prentice* (1788), 1 H. Blacks. 49; *Chapman v. Pointon* (1740), Stra. 1150; *Hallett v. Mears* (1810), 13 East, 15; *Ex parte Roseoe* (1816), 1 Merivale, 191; *Holme v. Smith* (1815), 1 Marsh. 410.

(*o*) See scale of costs in Appendix B.

disallowed for some special reason personal to the witness himself (*e.g.*, for equivocation in giving evidence or some other misconduct), and in cases which fall within the operation of these statutes it would appear that, except where the witness is so poor that he cannot provide his necessary travelling expenses, the making any advance of money with a subpoena is rather a mere matter of prudence than of absolute legal obligation (*p*); nevertheless, it should not pass unnoticed that the statute by which subpoenas served "*in any of the parts of the United Kingdom*" compels attendance in any other of the parts of it, provides, that no *attachment* shall issue for disobedience, unless reasonable charges of going to, and returning from, the place of trial shall have been tendered (*q*). This was doubtless inserted with a view to the very great distances to which witnesses might occasionally be called under the authority of this statute, without the *means* of bearing their expenses until they could make application to the court for recompense. In a civil case, two guineas were given to the wife of a publican living sixty miles from Lancaster, with a subpoena to attend and give evidence at the assizes held there. She did not at the time complain that the amount was too small. She had a sick infant at the breast. Her best route, in order to get coach, was through Liverpool, though farther in distance. The inside fare from that place was a guinea. She would have had to stay three days at Lancaster. She did not attend the assizes, and the court refused to make a rule absolute for an attachment against her, holding that, under the circumstances, she might reasonably require an inside place out and home, and that two guineas was too little for her expenses (*r*).

The compensation, however, provided by statute for the attendance of witnesses in cases of *misdemeanour* is limited to the cases enumerated in the several statutes under which costs are allowed: and therefore in criminal prosecutions for other misdemeanours it behoves the prosecutor, in order to secure the attendance of his witnesses, to tender them sufficient to cover all reasonable expenses.

A defendant after remand on bail is privileged from arrest on his way from his home to the court, while at the court, and thence from the court home again; and the same

Privilege of
prosecutor,
witnesses,
jurors and

(*p*) 2 St. Tri. 124; 2 Hawk. c. 46, s. 168; 2 Hale, 282. In one case a witness subpoenaed for a defendant indicted for a conspiracy, attended the trial, but, before being examined, requested payment of his expenses, not having received any advance on account of them. Defendant refused to pay them; still, though the indictment was removed by *certiorari*, and came down for trial at the assizes as a civil record, he was compelled to give evidence: *R. v. Cooke* (1824), 1 C. & P. 322, A. Park, J.

(*q*) 45 Geo. 3, c. 92, s. 4. See sect. 3, *ante*, p. 118.

(*r*) *Dixon v. Lee and Hawkes* (1834), 5 Tyrwhitt's R. 180.

defendant on
bail—*cundo*,
morando et
redeundo.

privilege exists with respect to prosecutors, jurors and witnesses (*s*). But it has been held in England that a defendant who has been tried and acquitted ceases thereupon to have any privilege, and may be arrested on his way home (*t*); whilst in Ireland it has been held that a defendant acquitted is privileged from arrest on his way home (*u*).

So a witness attending before a police magistrate on a charge of felony after a remand is privileged from arrest, *cundo*, *morando et redeundo*, though he was not under recognizances or summons to appear, on the ground that a suitor has the right to the attendance of any person *without* whose presence full justice cannot be done (*x*).

But a voluntary prosecutor, or a common informer, going to obtain a summons from justices, is not privileged from arrest; nor, therefore, is he privileged when returning after having obtained his summons, for the privilege is entire, and he is not entitled to it *redeundo* unless he was also entitled to claim it *cundo et morando* (*y*); but the inferiority of the tribunal, being a lawful tribunal, does not affect the principle upon which the privilege rests (*z*).

Arresting on civil process, in the face of the court, a party who is necessarily in attendance there, *e.g.*, by virtue of his office, or on subpoena, or at the request of a prosecutor, though without subpoena (*a*), or under recognizance to prosecute and give evidence, or give evidence only, or on some other lawful occasion, *e.g.*, business to be done there, as preferring a bill, or giving information against any person, or tendering a fine on an indictment, is a contempt (*b*), and the party so arrested may be discharged by the sessions after examination on oath. But if he was arrested on his way to or from the place of holding the sessions, or at the sessions town, out of view of the court, after the sessions are over, the application for his discharge must be to the court from which the process issued (*c*) as soon as possible after the arrest (*d*). It seems

(*s*) *Gilpin v. Benjamin* (1869), 4 L. R. Ex. 131. In this case the defendant was arrested in court immediately upon his leaving the dock, and the Court of Queen's Bench, upon the process of which court the arrest was made, declined to discharge the defendant, saying that it was not their business to vindicate the dignity of the court of quarter sessions in which the arrest took place, and that so far as the defendant was concerned he had no right to complain of having been arrested *even in court*. *Seem*ble, the court of quarter sessions might have ordered his instant release in order to vindicate the dignity of the court.

(*t*) *Haar v. Hyde* (1851), 20 L. J. Q. B. 185.

(*u*) *Callans v. Sherry* (1832), Alcock & Napier, 125.

(*x*) *Montague v. Harrison* (1857), 27 L. J. C. P. 24.

(*y*) *Ex parte Cobbett* (1857), 26 L. J. Q. B. 293.

(*z*) *Ibid*.

(*a*) *Per* Lord Kenyon, in *Arding v. Flower* (1800), 8 T. R. 536; *Meakins v. Smith* (1791), 1 H. Bla. 636.

(*b*) 2 Hawk. c. 1, s. 18.

(*c*) See *Selby v. Hills* (1832), 8 Bing. 166; Com. Dig. Privilege (A 1); *Clark v. Molineux* (1664), 1 Lev. 159.

(*d*) *R. v. Burgess* (1838), 8 A. & E. 275.

that if a necessary witness is so arrested, a court of quarter sessions may postpone a trial, or an appeal, till he is discharged by order of the court from which the process issued (*e*).

SECTION 4.

JURISDICTION OF GRAND JURY OVER OFFENCES IN POINT OF
LOCALITY—THEIR DISCHARGE.

The jurisdiction of the grand jury is, at common law, confined to offences committed (*f*) within the county, borough or precinct from whence they are summoned. No indictment, indeed, could be, on the face of it, valid, without showing that the offence was committed within that limit, unless in cases in which jurisdiction is given to them over other places by statute; and, in all other cases, although the charge be of a nature unaffected by locality, if it should appear that it was wholly committed in another county or borough than that in which it is indicted, the party must be acquitted. An inland sea belongs to the counties respectively by which it is bounded, and therefore the Bristol Channel, between the counties of Somerset and Glamorgan, is to be considered as within the counties by the shores of which its several parts are respectively bounded (*g*). The venue in the margin shall be taken to be the venue for all the facts stated in the body of the indictment; but as to bills for offences committed within a county of a city or town corporate, see *post*, p. 161. The grand jury, therefore, cannot inquire of any offences committed without the limits in respect of which they are impanelled, except enabled so to do by legislative provision. Therefore, for example, an indictment for obtaining goods, &c. by false pretences, must be found by a jury of the county where the goods were so obtained (*h*); and where money is obtained by means of false statements contained in a begging letter, and is transmitted to the prisoner in a letter through the post, the prisoner is triable where the letter is posted (*i*),

Limits of jurisdiction to inquire in point of locality.

Bristol Channel.

In false pretences.

(*e*) The narrow limits within which arrest on mesne process has been confined by the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 6, have rendered the subject of privilege from arrest on civil process much less prominent than it was in former times. Committals for non-payment of judgment debts under sects. 4 and 5 of the Debtors Act, 1869, are still sufficiently frequent to render the subject by no means obsolete.

(*f*) *I.e.*, completed; *R. v. G. W. Rail. Co.* (1842), 3 Q. B. 333.

(*g*) *R. v. Cunningham* (1859), 28 L. J. M. C. 66.

(*h*) *R. v. Stanbury* (1862), 31 L. J. M. C. 88.

(*i*) *R. v. Jones* (1850), 19 L. J. M. C. 162.

Place where
offender is
apprehended.

but the offence of sending a threatening letter to obtain money is complete where the letter is sent by post in the place where it is delivered (*k*). By statute, jurisdiction is conferred in indictable offences committed on the high seas on the quarter sessions of any county or place where the offender is apprehended or in custody (*l*). Where a statute, creating a new felony, directs that it may be tried in the county where the offender is apprehended, without containing negative words, the provision is only cumulative, and he may still be tried in the county where the offence was committed (*m*). It seems that, by the common law, if a fact done in one county prove a nuisance to another, it may be indicted in either; though it is more correct to lay the venue where the fact was done.

Each commission of the peace points out over what portions of the county or riding, division or county, the jurisdiction of the justices named in it extends. By the Municipal Corporations Act, 1882 (*n*), no part of any borough having a separate court of quarter sessions shall be within the jurisdiction exercisable out of quarter sessions of the justices of a county where the *borough was exempt* therefrom before the passing of the Municipal Corporation Act, 1835 (*o*). This provision strips the county sessions of jurisdiction over those places and districts, which, being originally parts of counties at large, were by charter or otherwise made, or claimed to be made, subject to the concurrent power of both sets of justices (*p*); or by the operation of sects. 7 and 8 of 5 & 6 Will. 4, c. 76, were taken from the county, and included within the boundaries of any borough, the rest or ancient part of which was exempt from the jurisdiction of the county justices before the passing the Act. The suburbs of ancient boroughs which, from comparative insignificance, have swelled to commercial importance, afford frequent instances of a state of things to which the above section applies. This is elucidated by a case respecting the parish of Clifton (*q*), at one time a part of Gloucestershire for every purpose, but afterwards added to Bristol, as to the

(*k*) *R. v. Lloyd* (1767), 2 East, P. C. 1122.

(*l*) 24 & 25 Vict. c. 96, s. 115; 24 & 25 Vict. c. 97, s. 72; 24 & 25 Vict. c. 99, s. 36; and 24 & 25 Vict. c. 100, s. 68; *R. v. Peel* (1862), 32 L. J. M. C. 65.

(*m*) 1 Hale, 694; 3 Inst. 87.

(*n*) 45 & 46 Vict. c. 50, s. 154 (2).

(*o*) This section is in effect a reproduction of sect. 111 of the Municipal Corporation Act, 1835 (5 & 6 Will. 4, c. 76), the words "exercisable out of quarter sessions" having been inserted in consequence of *R. v. Dean* (1841), 10 L. J. M. C. 126. See *R. v. Recorder of Bristol* (1854), 24 L. J. M. C. 43. The following decisions on sect. 111 of the Act of 1835 are authorities upon sect. 154 of the Act of 1882: *R. v. Inhab. of Bridgewater* (1839), 10 A. & E. 711; *R. v. Justices of Wilts* (1848), 11 Q. B. 758.

(*p*) See *R. v. Musson* (1826), 9 D. & R. 172.

(*q*) *R. v. Gloucestershire (Justices)* (1836), 4 A. & E. 689.

right of voting for members of Parliament for that city by the Boundary Act, 2 & 3 Will. 4, c. 64, sched. O. By the Municipal Corporation Act, 1835 (5 & 6 Will. 4, c. 76), the "metes and bounds" fixed by 2 & 3 Will. 4 became the limits of certain cities named in the Act, of which Bristol was one; and the question was, whether, since that Act, any justices of Gloucestershire had power to make an order for diverting a footpath in Clifton, and, next, if they had, whether a mandamus would lie to the Gloucestershire quarter sessions, commanding them to enrol it in the usual way. The Court of King's Bench held that, as to Bristol and the other boroughs mentioned in the first section of schedules A. and B. of the last-mentioned Act, every place included within the bounds of any of those boroughs, as described by the Parliamentary Boundary Act (2 & 3 Will. 4, c. 64), was made a part of them for *all* purposes; and, consequently, that the parish of Clifton was part of the borough of Bristol, *inter alia*, as to stopping up ways; so that the Gloucestershire justices had no jurisdiction within it. It seems, however, that in boroughs whose charters contained no clause of non intro-mittant, and consequently where the county justices, previously to the 5 & 6 Will. 4, c. 76, had concurrent jurisdiction with the borough justices, such concurrent jurisdiction still continues, notwithstanding the grant of a court of separate quarter sessions.

The powers of borough justices to try offenders at the quarter sessions for boroughs were universally abolished by 5 & 6 Will. 4, c. 76, s. 107 (*r*); and recorders, each of whom singly constitutes a court of quarter sessions "in and for" the borough to which he is appointed, have cognizance of all crimes, offences and matters whatsoever cognizable by any court of quarter sessions of the peace for counties in England.

The above-mentioned sections appear to have the effect of excluding the county quarter sessions from jurisdiction within those boroughs previously exempt from their power, and to which a separate grant of quarter sessions has been made; but the county jurisdiction is necessarily continued in other boroughs, whether before 5 & 6 Will. 4, c. 76, they had or had not concurrent jurisdiction.

Indictments for offences committed within cities and towns which are counties of themselves may be preferred, or if found be removed for trial before the assizes of the next adjoining county, under 38 Geo. 3, c. 52, and 14 & 15 Vict. c. 55, s. 19, and see *post*, pp. 137, 139.

Cities and towns being counties.

Also, by the common law, if one guilty of simple or compound larceny in one county carry away the stolen goods into another, he may be indicted for the simple or compound

Larceny in one jurisdiction and possession of the

(*r*) And see sect. 158 (1) of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50).

stolen property in another.

larceny in the county in which he committed it, or for a simple larceny in the county into which, or in any county through which, at any distance of time (*s*), he carried the goods; for as, in contemplation of law, the possession continues in the party robbed, every moment's continuance of the trespass and felony is a crime of the same description with the first taking, and amounts, in legal consideration, to a new taking; so that the offence of simple larceny must be regarded as complete in any of such counties (*t*); it being said that the larceny itself is ambulatory, but the aggravating circumstances fixed (*u*).

But now, if any person shall have in his possession in any one part of the United Kingdom (*x*), any chattel, money, valuable security or other property whatsoever which he shall have stolen or otherwise feloniously taken in any other part of the United Kingdom, he may be dealt with, indicted, tried and punished for larceny or theft in that part of the United Kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part.

And where R. stole a chattel at a place out of the county of M. and consigned it as a parcel by the railway company to the receiver in the county of M., who delivered it at the address in M., for the purpose of disposing of it for R., where it was seized by the police: it was held that R. was in constructive possession of the chattel in M. and was indictable and triable there (*y*).

(*s*) *R. v. Parkin* (1824), Moo. C. C. 45.

(*t*) 1 Hale, 507; 2 *ibid.* 163; 3 Inst. 113; 2 East, P. C. 771. See as to acquittal of the *simple* larceny being, in such a case, no bar to indictment for the *compound*, and *vice versa*, 2 Hale, 245.

(*u*) 1 Hale, 536; *R. v. Thomson* (1795), 2 Russ. 174. But where the original taking, though created a felony by statute, was not a larceny at common law, subsequent possession in another county of the thing stolen cannot be considered a larceny. A prisoner was indicted at the Central Criminal Court for a common law simple larceny in stealing lead in Middlesex; and it appeared that the lead was taken from the roof of a church in Bucks, which is out of the jurisdiction of the Central Criminal Court: it was held that he could not be convicted there on the possession in Middlesex: *R. v. Millar* (1837), 7 C. & P. 665 (Park, Alderson, Patteson, JJ.).

(*x*) 24 & 25 Vict. c. 96, s. 114.

(*y*) *R. v. Rogers* (1868), L. R. 1 C. C. R. 136.

The possession of a banker to whom a stolen note has been transmitted through the post, or of the post-office servants, through whose hands it passed, may be regarded as the possession of the thief or receiver (*z*).

Offences committed in Scotland, Ireland, or parts of the King's dominions, though out of the United Kingdom, as the islands of Man, Guernsey, Jersey, &c., were in general only indictable there, and offenders apprehended here must have been sent there for trial.

Modern provisions extend the powers of grand juries and courts to inquire of offences which might otherwise escape punishment under the strict rules of the common law as to the locality of crime. Thus, it is provided, where any felony shall have been wholly committed within England or Ireland, the offence of any person who shall be an accessory, either before or after the fact to any such felony, may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony or any felonies committed in any county or place in which the act, by reason whereof such person shall have become such accessory, shall have been committed; and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony may be dealt with, inquired of, tried, determined and punished by any court which shall have jurisdiction to try the principal felony or any felonies committed in any county or place in which such person shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on land, or begun on the sea and completed on land, or begun on the land and completed on the sea, and whether within his Majesty's dominions or without, or partly within his Majesty's dominions and partly without: provided that no person who shall be once duly tried, either as an accessory before or after the fact or for a substantive felony under that Act, shall be liable to be afterwards prosecuted for the same offence (*a*).

And when any person shall within the jurisdiction of the admiralty of England or Ireland become an accessory to any felony, whether the same be a felony at common law or by virtue of any Act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed on the high seas (*b*).

Accessories,
where triable.

Accessories to
felonies on the
seas.

(*z*) *R. v. Cryer* (1857), 26 L. J. M. C. 192.

(*a*) 24 & 25 Vict. c. 91, s. 7.

(*b*) *Ibid.* s. 9.

Offences on
borders of
counties.

For the more effectual prosecution of offences committed near the boundaries of counties, or partly in one county and partly in another, it is provided that, where any felony or misdemeanour shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards (*c*) from any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanour may be dealt with, inquired of, tried, determined and punished in any of the said counties, in the same manner as if it had been actually and wholly committed therein (*d*). This provision does not apply to any other than boundaries of counties *not* corporate, and prosecutions in those counties. Thus felony committed in the county of the city of London, on London bridge, and within five hundred yards of that part of the county of Surrey which consists of the borough of Southwark, was held not triable at the borough sessions for Southwark (*e*), and the offence must be laid in the indictment to have been committed where it is tried. Thus a bill was found at Stamford *borough* sessions for an assault; the offence was laid as committed at the parish of St. Mary, in the borough of Stamford, in the county of Northampton; the indictment was removed by certiorari. The venire went to the sheriff of Lincolnshire, and the party was convicted there. The judgment was arrested (*f*), for to make the trial good in either county under 7 Geo. 4, c. 64, s. 12, the offence must have been tried in the same county in which it is laid.

Offences
committed on
journeys.

And further, “for the more effectual prosecution of offences committed *during journeys* from place to place,” it is enacted that, where any felony or misdemeanour shall be committed on any person, or on or in respect of any property in or upon any carriage whatever, employed on any journey, or on any person, or in respect of any property on board any vessel whatever, employed on any voyage or journey upon any navigable river, canal, or inland navigation; such felony or misdemeanour may be dealt with, inquired of, tried, determined and punished in any county, through any part whereof such carriage or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanour shall have been committed, in the same manner as if it had been actually committed in such county. And in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal or navigation shall constitute the boundary of any two counties, such felony or

(*c*) The 500 yards is to be measured in a direct line from the border, and not by the nearest road: *R. v. Wood* (1841), 5 Jur. 225, Parke, B.

(*d*) 7 Geo. 4, c. 64, s. 12.

(*e*) *R. v. Welch* (1827), 1 Moo. C. C. 175. See *R. v. Great Western Rail.* (1842), 3 Q. B. 333.

(*f*) *R. v. Mitchell and another* (1842), 2 Q. B. 636.

misdemeanour may be dealt with, inquired of, tried, determined and punished in either of the counties through or adjoining to or by the boundary of any part whereof such carriage or vessel shall have passed in the course of the journey or voyage during which such felony or misdemeanour shall have been committed, in the same manner as if it had been actually committed in such county (*g*). And this enactment is not confined to public conveyances, but applies to any carriage or wagon on a journey (*h*), and railway trains also are within the Act (*i*).

By 24 & 25 Vict. c. 99, s. 28, when any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction either on the day of such first-mentioned tendering, uttering, or putting off, or within the space of ten days next ensuing, or where two or more persons acting in concert in different counties or jurisdictions shall commit any offence against this Act, every such offender may be indicted and the offence laid and charged to have been committed in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been wholly committed within such one county or jurisdiction.

The receiver of any chattel, money, valuable security, or other property (see definition in the Act), knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted, or disposed of, may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanour only, be dealt with, indicted, tried and punished in any county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanour may by law be tried, in the same manner as such receiver might be dealt with, indicted, tried and punished in the county or place where he actually received such property (*k*). A receiver sending a stolen bank note by post into the county of W. has possession of the note in W. within the meaning of this section, the possession of the post office authorities being his possession (*l*). So in indictments against persons employed in the public service of the King; or as a constable, or in the police; for larceny or embezzlement may be found by a jury of the county or place in which he shall be apprehended or be in custody (*m*).

As to coinage offences committed in two or more counties.

As to receivers of property either stolen or unlawfully obtained, &c.

Receivers.

Possession by the post.

Larceny or embezzlement by public servants.

(*g*) 7 Geo. 4, c. 64, s. 13.

(*h*) *R. v. Sharpe* (1854), Dears. C. C. 415.

(*i*) *R. v. French* (1859), 8 Cox, C. C. 252.

(*k*) 24 & 25 Vict. c. 96, s. 96.

(*l*) *R. v. Cryer* (1857), 26 L. J. M. C. 192.

(*m*) 24 & 25 Vict. c. 96, s. 70.

Wreckers.

Whosoever shall plunder or steal any part of any ship which shall be in distress or wrecked, or any goods thereof, may be indicted either in the county or place in which the offence shall have been committed, or in any county or place next adjoining (*n*).

Embezzlement.

In an indictment for embezzlement, the venue may be laid in the county in which the clerk or servant who has received the money, &c. denied having received it (*o*).

Conspiracy.

A bill for conspiracy may be found by the grand jury of any county wherein an act was done by any of the conspirators in furtherance of the common design (*p*).

Trial in a different county by statute.

Whenever a statute authorises the *trial* of an offence in a different county from that where it is committed, the grand jury of the former acquire, by necessity, a right to present it (*q*).

Form of finding.

Mode of finding the bill.

The grand jury must find *a true bill*, or *no bill*, which is now usually done by indorsing the words "*a true bill*," or "*not a true bill*," as their decision is; and they cannot take on themselves, as a petty jury may, to return a special or conditional finding, or to alter the charge by selecting parts of *counts* as true, and rejecting the rest; but this rule does not prevent them, when there are several counts, from finding "*a true bill*" as to the charge contained in one, and ignoring it as to the charge contained in the other (*r*). Thus, if the indictment contained one count for riot, and the other for an assault, they find a true bill as to the assault, and indorse not a true bill as to the riot; this finding leaves the indictment, as to the count found, just as if there had originally been no other, every count containing an integral charge, and therefore having all the operation of a distinct bill (*r*). So they may find "*a true bill*" against a prisoner, and "*not a true bill*" as to a previous conviction also charged against him; or a "*true bill*" against one or more of several persons, and "*not a true bill*" against another or others.

Ignoring part of a bill.

Bringing bills into court.

When the grand jury have found one or more bills preferred before them to be true or not true, as the case may be, one of their number, in company with one or more others, returns into court with the bill and presents it to the court through the clerk of the peace, who refers to the indorsement on the back, and then publicly announces the nature and contents of the bill in this manner, addressing the grand jurymen, who have come into court, as follows: "*Gentlemen of the grand jury, you present a true bill (or not a true bill, as the case may be) against A. B. for felony (or misdemeanour, as the case may*

(*n*) 24 & 25 Vict. c. 96, s. 64.

(*o*) *R. v. Taylor* (1803), 3 B. & P. 596.

(*p*) *R. v. Brisac and Scott* (1803), 4 East, 164; *Deacon's case* (1746), Post. 9.

(*q*) Dick. Q. S. 5th ed. 164.

(*r*) *R. v. Fieldhouse* (1775), Cowp. 325.

be)." The grand jurymen present should give their attention to what the clerk of the peace says, in order that any mistake made by him may be at once corrected.

After the court has ascertained that all the bills intended to be preferred are exhausted, the grand jury receives its discharge from the chairman or recorder: but if they have not left the building or separated, they may be sent for back into court, so as to receive and find another bill (*s*). If the grand jury ignore a bill, a fresh bill against the same person for the same offence ought not to be presented to them, and if such fresh bill is sent before them they should take no notice of it, for if after they have come to a conclusion once, if a second bill could be preferred, so might any number, and their labours might never end (*t*). The court may refuse to receive a second bill so returned (*u*).

Discharge of
grand jury.

Though the grand jury returned on the first day of the sessions commonly serves the whole sessions, the court may command another to be returned and sworn. The ordinary instance of which in Lord Hale's time was, where the grand jury having brought in all their bills, are discharged by the court, after which, but before the end of the sessions, some new felony or misdemeanour is committed, and the party is taken or brought to gaol, or some former offender is taken and brought in, in like manner (*x*).

A prisoner should not be discharged immediately after a bill against him is thrown out, or until after proclamation for any one who has any further charge against him to go before the grand jury, which should not be made till the end of the session (*y*).

Discharge of
accused by
proclamation.

As to a grand juror afterwards sitting on the petty jury, see *post*, p. 235.

As to the postponement of preferring a bill, see *post*, p. 221.

(*s*) *R. v. Holloway* (1839), 9 C. & P. 43.

(*t*) *R. v. Humphreys* (1842), C. & M. 601; *R. v. Austin* (1850), 4 Cox, C. C. 385.

(*u*) *Ibid.*

(*x*) 2 Hale, 156.

(*y*) It would seem from Dalton, ch. 185, that formerly no prisoner was arraigned till after all the bills had been returned: see *post*.

CHAPTER IV.

OF THE INDICTMENT.

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SECTION I.

TRANSMITTING INDICTMENTS FOUND AT SESSIONS TO THE
ASSIZES FOR TRIAL.

WHEN a true bill is thus found and returned into court it becomes an "indictment."

Of indictments found at sessions and transmitted for trial at the assizes by the justices.

Indictments found at sessions for offences over which the sessions have jurisdiction by the terms of their commission, may be transmitted for trial at the next assizes without certiorari. By 4 Edw. 3, c. 2, passed while the justices had only power to inquire into felonies and trespasses done within their county as keepers of the peace without authority to determine them, they were to send indictments found before them to the justices of gaol delivery, who were to hear and determine them at the next gaol delivery within the county, whether the parties were in gaol or admitted to bail; and this course, though not usual at this day, on account of the power of hearing and determining such offences given to the quarter sessions by 18 Edw. 3, c. 2, is still legal. Accordingly where indictments found by the grand jury for the North Riding of Yorkshire against a prisoner at the quarter sessions for that riding for certain misdemeanours, were transmitted by them to the next assizes for that county, annexed to a certificate signed by the deputy clerk of the peace for the riding, certifying the finding of them, with the witnesses at the back, and signed by the foreman of the grand jury as found true bills, Mr. Baron Wood refused to try them, on the ground that they were not removed by certiorari, and that new indictments were not found at the assizes, and discharged the prisoners; but having stated the

case to the judges for guidance in future cases, they held that the indictments should have been tried at the assizes (*a*); but it has been said that indictments found in respect of offences which never came within the commission of the peace, such as treason, forgery, perjury, &c., are void, and if transmitted would not be tried by the judge (*b*), a fresh bill being in such cases necessary (*c*).

With reference to all indictable offences committed or alleged to have been committed within the county of any city or town corporate, it is enacted by 38 Geo. 3, c. 52, that the prosecutor, instead of preferring the bill of indictment at the assizes or quarter sessions for such city or town corporate, may prefer the bill to the grand jury of the next adjoining county at any sessions of oyer and terminer and gaol delivery, and every such bill of indictment found to be a true bill by such jury is as valid and effectual in law as if it had been found by a grand jury of such city or town corporate (*d*). This course the prosecutor is entitled to take of his own motion. A prosecutor who intends to avail himself of this right must enter into a recognizance in the sum of 40*l.* conditioned to pay the extra costs attending the prosecution for such offence in such next adjoining county, if the court before whom the trial is had shall be of opinion that he ought to pay the same (*e*). He must also give notice ten days previous to the holding of the next court of oyer and terminer or gaol delivery in the adjoining county to every person bound by recognizance of his intention to prefer such indictment in such county, and also to the committing justice, in order that such committing justice may return the depositions, &c. to such court of oyer and terminer or gaol delivery (*f*). Again, if the venue in any indictment removed into the King's Bench by *certiorari* be laid in a county of a town, &c., that court may order the trial to be by a jury of the county next adjoining, without subjecting the prosecutor to recognizance for paying extra costs (*g*).

Offences in counties of cities or towns.

In order to secure the removal for trial of persons in custody, sect. 4 of 38 Geo. 3, c. 52, provides that a judge of the King's Bench Division, or any of the justices of oyer and terminer or general gaol delivery for such next adjoining county, may, on the application of any such prosecutor, ten days next before the holding of such sessions of oyer and

(*a*) *R. v. John Wetherell* (1819), R. & Ry. 381. See also 4 Inst. 168; 2 Hawk. P. C. c. 5, s. 32; *ibid.* c. 6, s. 2; *ibid.* c. 8, s. 57; Bac. Abr. *Justices of the Peace*, E 2; Crown C. Comp. 14, 27; 2 Hale, 32—46.

(*b*) *R. v. Haynes* (1825), Ry. & M. 298; but see now 5 & 6 Vict. c. 38, s. 2, at p. 136.

(*c*) *R. v. Rigby* (1839), 8 C. & P. 770; see also *ante*, p. 13.

(*d*) 38 Geo. 3, c. 52, s. 2.

(*e*) *Ibid.* s. 12.

(*f*) Sect. 5. See also 14 & 15 Vict. c. 55, ss. 19, 23, 24.

(*g*) 38 Geo. 3, c. 52, s. 1; *R. v. Nottingham* (1803), 4 East, 208.

terminer or general gaol delivery, issue writs of habeas corpus to cause any persons who may be in custody, charged with any offences committed within any such city or town corporate, to be removed into the custody of the keeper of the gaol of such next adjoining county for trial. And in order to secure the apprehension of persons not in custody, against whom bills may be found pursuant to the Act, sect. 4 also provides that whenever, in pursuance of this Act, any bill of indictment is found by such grand jury as aforesaid against any person for any offence committed within any such city or town corporate, it shall be lawful for such court of oyer and terminer or gaol delivery to issue process for apprehending such person and to compel the attendance of witnesses, in like manner as in cases of indictments found at such court for offences committed within such adjoining counties. Recognizances entered into by persons bound by recognizance to appear at any court of any such city or town corporate are to be forfeited, if, upon due notice being given, they do not attend the court of trial (*h*).

The statute 38 Geo. 3, c. 52, it will be observed, does not enable a bill to be preferred to a grand jury at a court of quarter session for the next adjoining county, but only to a grand jury at a court of oyer and terminer, or gaol delivery; but the Act seems to apply equally to cases of prisoners committed for trial to courts of quarter sessions for the city or town corporate, as to cases committed to the assizes for such city or town corporate.

Removal by judge of assize of indictments for offences to try which the court of quarter sessions has no jurisdiction.

If a bill be found at the sessions which that court has no jurisdiction to try, it may be removed by a judge of assize to the assizes, and the recognizances for the prosecution, &c. at the sessions are in such case obligatory for the assizes; for by 5 & 6 Vict. c. 38, s. 2, "It shall be lawful for any judge of one of her Majesty's superior courts at Westminster, acting under any commission of oyer and terminer and gaol delivery for any county, to issue, if he shall think fit, any writ or writs of certiorari or other process directed to the justices of the peace acting in and for such county, riding, division or liberty, or to the recorder of any borough situated within the said county, commanding the said justices and recorder severally to certify and return into the court holden under the authority of such commission of oyer and terminer and gaol delivery, all indictments or presentments found or taken before any of the said justices of the peace or recorder of any offences which, after the passing of that Act, such justices or

(*h*) 38 Geo. 3, c. 52, s. 5. As to estreating recognizances, see sect. 6. As to costs of prosecutions, see sect. 7. The Act does not extend to the cities of London and Westminster or the borough of Southwark (sect. 10). For the purposes of the Act, the county of York is to be considered as the next adjoining county to Kingston-upon-Hull, and the county of Northumberland to Newcastle-upon-Tyne (sect. 9).

recorder have not jurisdiction to try, and the several recognizances, examinations and depositions relative to such indictments and presentments: and also, if necessary, by writ or writs of habeas corpus, to cause any person or persons who may be in the custody of any gaol or prison charged with any such offence, to be removed into the custody of the keeper of the common gaol of the county, so that the same offences may be dealt with, tried and determined according to law under the authority of the said commission."

And by section 3, every recognizance which shall have been entered into for the prosecution of any person at any court of sessions of the peace for any offence which, after the passing of this Act, such court will not have jurisdiction to try, and every recognizance for the appearance as well of any witness to give evidence upon any bill of indictment or presentment for any such offence, as of any person to answer our lord the King for or concerning any such offence, or to answer generally before such court, shall, in case any writ of certiorari or habeas corpus be issued for the purpose of removing such indictment or presentment, or such person so in custody as aforesaid, be obligatory on the parties bound by such recognizance to prosecute and appear and give evidence, and do all other things therein mentioned with reference to the indictment or presentment, or person so removed as aforesaid, before the justices of oyer and terminer and gaol delivery acting in and for that county, in like manner as if such recognizance had been originally entered into for prosecuting such offence, appearing or giving evidence, or doing such other things before the said justices of oyer, terminer and gaol delivery. Provided always, that one week's notice shall have been given either personally or by leaving the same at the place of residence as of which the parties bound by such recognizance are therein described, to appear before the court of oyer and terminer and gaol delivery instead of the said court of sessions of the peace. Provided also, that the judge who shall grant such writ of certiorari or habeas corpus shall cause the party applying for such writ or writs, whether he be the prosecutor or party charged with such offence, to enter into a recognizance in such sum, and with or without sureties, as the judge may direct, conditioned to give such notice as aforesaid to the parties bound by such recognizance to appear before the said court of oyer and terminer and gaol delivery instead of before the said court of sessions of the peace respectively, and to do such other things with reference to the indictment, presentment or person removed as such court or judge shall direct.

Recognizances to be obligatory for the assizes.

A week's notice required.

Recognizance of party removing.

So, after indictment found by any grand jury of a county of a city or town corporate, "if it shall appear to any court of oyer and terminer or general gaol delivery for the county of any city or town corporate, that such an indictment is fit and proper to be tried by a jury of any next adjoining county,

Defendant may remove indictment, found in a city or town, to be tried in next

adjoining
county.

it shall and may be lawful for the said court of oyer and terminer or general gaol delivery, *at the prayer of any defendant*, to order such indictment and the several recognizances, examinations and depositions relative to such indictments, to be filed with the proper officer, to be by him kept among the records of the courts of oyer and terminer or general gaol delivery for such next adjoining county, and to cause the defendant or defendants in such indictments to be removed by writ of habeas corpus to the gaol of such next adjoining county, which writ the said court is hereby directed and authorized to issue if such defendant or defendants be in the prison of such city or town corporate; and if he, she or they be not in such prison to commit such defendant or defendants to the gaol of such next adjoining county, and to cause the prosecutors and witnesses against such defendant and defendants to enter into a recognizance or recognizances to prosecute and give evidence against such defendant or defendants at the sessions of oyer and terminer and general gaol delivery for such next adjoining county, and that the same proceedings and trial shall be had, and the same judgment shall be given in such last-mentioned court of oyer and terminer or general gaol delivery, as would and might be had and given in cases of indictments or inquisitions for the like offences committed within such next adjoining counties" (i).

Recogni-
zances to be
transmitted to
the assizes
of next
adjoining
county.

By 38 Geo. 3, c. 52, s. 7, "All and every person and persons before whom any recognizances entered into for the prosecution of any person or persons for any offence or offences committed within the county of any city or town corporate, and for the appearance of witnesses to give evidence on such indictments, or for the appearance of any person to answer, shall be entered into, or by whom any examination or deposition shall be taken touching any such offence or offences as aforesaid, are required to return the same to the next court of oyer and terminer and general gaol delivery for such next adjoining county as aforesaid, *upon such prosecutor or prosecutors as aforesaid* leaving at the dwelling-house or other place of abode of the person or persons before whom such recognizance or recognizances shall be entered into, or by whom such examination or deposition shall be taken, ten days before the holding of any sessions of oyer and terminer and general gaol delivery for such next adjoining or other county as aforesaid, notice in writing of his or their intention to prosecute such indictment or inquisition at such last-mentioned session of oyer and terminer and general gaol delivery for any offences committed within the county of any city or town corporate, and that after the delivery as aforesaid of any of the said notices, it shall not be lawful for any person or persons to prefer any bill or bills of indictment for any

(i) 38 Geo. 3, c. 52, s. 3.

offence or offences mentioned in the said recognizances or any of them at or to any sessions of oyer and terminer or general gaol delivery for the county of such city or town corporate."

As to commitments for offences not triable at quarter sessions by justices of a county of a city or of a town, see 14 & 15 Vict. c. 55, s. 19.

Indictments may also be removed from courts of quarter session, for trial either in the King's Bench Division, or at the Central Criminal Court, or at the assizes, by certiorari.

SECTION 2.

OF CERTIORARI TO REMOVE INDICTMENTS.

The certiorari is a writ issuing out of the Crown Office in the name of the King, and tested by the Lord Chief Justice of England, which the King's Bench Division, by virtue of its superintending authority over the courts of inferior criminal jurisdictions in the kingdom, directs to the judges or officers of those courts, or to justices at sessions or out of sessions, commanding them to certify or return the records or proceedings in a judicial matter pending before them, to the end that the party may have more sure and speedy justice before the King, or such justices as he shall assign to determine the cause (*j*). What the writ is.

The writ of certiorari, except when applied for by the law officers of the crown (*k*), is not a writ of course, but is granted or refused at the discretion of the court (*l*); but it always lies, unless expressly taken away by statute (*m*). And if a new offence be created, and it be directed to be tried by a court established according to the course of common law, the indictment in respect of it is removable by certiorari (*n*); thus, an indictment for non-repair of a highway ordered under 5 & 6 Will. 4, c. 50, s. 95, is removable, notwithstanding the certiorari is taken away in respect of any matter or thing done or transacted in or relative to the execution of the act (*o*). So, although a statute prohibits the removal of an indictment by certiorari into a superior court, if a subsequent statute gives permission for its removal into a court of peculiar juris- When it lies.

(*j*) 1 Bac. Abr. Certiorari, A. : Com. Dig. Certiorari.

(*k*) 4 Burr. 2458; *R. v. Eaton* (1787), 2 T. R. 89; 1 East, 303, n. (*l*).

(*l*) *R. v. JJ. of Surrey* (1870), 39 L. J. M. C. 145.

(*m*) *R. v. Hanson* (1821), 4 B. & A. 521.

(*n*) *R. v. Wadley* (1816), 4 M. & S. 508; *R. v. Hube* (1794), 5 T. R. 542.

(*o*) *R. v. Inhabs. of Sandon* (1854), 23 L. J. M. C. 129.

It is a discretionary writ.

diction where no such prohibition exists, the restriction on the certiorari is gone altogether as against the King's Bench (*p*).

Formerly the writ went to private prosecutors as a matter of course, but by 5 & 6 Will. 4, c. 33 [repealed 54 & 55 Vict. c. 67, S. L. R.], no writ of certiorari was to issue from the Court of King's Bench at Westminster, for removing into that court any indictment or presentment from any court of session, assize, oyer and terminer or gaol delivery, or any other court, at the instance of the prosecutor or any other person, except his Majesty's attorney-general, without motion first made in the Court of King's Bench, or before some judge of that court, and leave obtained to remove such indictment or presentment, in the same manner as similar motions may be made and leave given where such application is made on the part of the defendants.

In felonies the rule is only to show cause, whereas in misdemeanours, unless the case is doubtful, it is absolute in the first instance to remove the indictment, &c. (*q*). In vacation the writ is obtained by obtaining an order at chambers, which is *nisi* in the first instance (*r*).

The practice upon motion for a certiorari is now governed by the Crown Office Rules, 1886.

Grounds for the issuing of the writ.

Rule 29 enacts that no indictment, except indictments against bodies corporate not authorised to appear by solicitor in the court in which the indictment is preferred, shall be removed into the King's Bench Division either at the instance of the prosecutor or of the defendant (other than the attorney-general acting on behalf of the Crown), unless it be made to appear to the court or the judge by the party applying that a fair and impartial trial of the case cannot be had in the court below, or that some question of law of more than usual difficulty and importance is likely to arise upon the trial, or that a view of the premises in respect whereof any indictment is preferred, or a special jury, may be required for a satisfactory trial of the same.

By rule 33 no writ of certiorari shall be granted, issued or allowed to remove any judgment order or conviction or other proceeding had or made by or before any justice or justices of the peace of any county, city, borough, town corporate, or liberty, or the respective general or quarter sessions thereof, unless such writ of certiorari be applied for within six calendar months next after such judgment, order, conviction, or other proceeding shall be so had or made, and unless it be proved by affidavit that the party suing forth the same has given six days' notice thereof in writing to the justice or justices, or to two of them if more than one, by and before whom such

(*p*) *R. v. Brier* (1858), 19 L. J. M. C. 121.

(*q*) *R. v. Spencer* (1839), 8 D. P. C. 127; Dick. Q. S. 956.

(*r*) *R. v. Chipping Sodbury* (1834), 2 N. & M. 99; Dick. Q. S. 956.

judgment, order, conviction, or other proceedings shall be so had or made, in order that such justice or justices or the parties therein concerned may show cause, if he or they shall so think fit, against the granting, issuing, or allowing such writ of *certiorari*.

By rule 30, no writ of *certiorari* shall be allowed unless the person at whose instance it shall have been issued shall enter into a recognizance of such nature as set forth in the rule, and such recognizance shall contain a condition for payment of the costs of the prosecution subsequent to the removal of the indictment if the defendant, or any of the defendants if more than one, be convicted.

By rule 32, if the person at whose instance the writ of *certiorari* shall have been awarded does not enter into such a recognizance as required by rule 31, the court shall proceed to trial of the indictment as if such writ or order had not been awarded.

The mere circumstance of a defendant, in an indictment for an assault found at quarter sessions, being a magistrate of the county is not sufficient ground for presuming that the bench would not fairly try the case, which was a question purely of fact(s); but it might be otherwise, when he had been circulating among the magistrates of the county a printed statement of the charges against him(t). Nor is it a ground for the writ to remove an indictment, found at quarter sessions for an assault on a girl, that the chairman of the quarter sessions was very intimate with the father of the prosecutrix, and they both held farms under the same landlord, and that the prosecution had been the subject of much discussion in the neighbourhood(u), or that the chairman of quarter sessions is alleged to bear a strong prejudice against the accused(v).

The smallness of the number of jurymen in a borough, and the prevalence of violent political feeling bearing upon the charge(w), or the intimacy of the accused with many of them(x), may be a ground for removing the indictment.

The court, instead of granting the writ, may express an opinion that the recorder would be well advised to take into consideration the advisability of sending the indictment to be tried at the assizes(y).

To obtain the writ on the ground that a difficult or important question of law is likely to arise on the trial, the affidavit

(s) *R. v. Fellows* (1836), 4 Dowl. 607.

(t) *R. v. Grover* (1840), 8 Dowl. 325; *Reban v. Trevor* (1840), 4 Jur. 292.

(u) *R. v. Renshaw* (1841), 5 Jur. 801. See also *R. v. Chipping Norton* (1726), 1 Barnard. 7.

(v) *R. v. Jacobs* (1839), 3 Jur. 999.

(w) *R. v. Oulsley* (1842), 6 Jur. 62.

(x) *Garbett v. Oulsley* (1843), 6 Jur. 193. See also *Reban v. Trevor*, *sup.*

(y) *R. v. Reynolds* (1865), 12 L. T. N. S. 580.

must show the specific grounds on which the legal difficulties will arise (*z*); but since the Court of Crown Cases has been established the court is reluctant to grant the writ on this ground.

On an indictment for a nuisance, where it is necessary to have a view of the premises, the writ will be granted upon the affidavit that it cannot otherwise be obtained (*a*).

The court will, on good ground being shown, issue a certiorari after the sessions have quashed the indictment, to bring up the indictment and the order to see whether the order was a valid order or not, where there is no regular judgment of the sessions quashing the indictment which the prosecutor could bring error on (*b*).

What it may
remove.

It may issue to remove a record that shall come within its description before the time of its return, though there were no such record in esse at the time of its teste, nor at the time when it was first delivered to the court below (*c*).

At what time
it may issue.

By 60 Geo. 3, c. 4, s. 4, writ of certiorari may be applied for and issued before indictment found in the like cases, in the same manner and upon the same terms and conditions as if such writ of certiorari had been applied for after such indictment had been found.

A certiorari will not be granted after verdict, and before judgment (*d*).

Mode of
obtaining
the writ.

The mode of obtaining this writ and the proceedings thereupon do not come within the scope of this work; but the reader is referred to Short and Mellor's Practice of the Crown Office for information on that subject. Upon the application of one of several defendants to remove an indictment, the judge may order him to enter into a recognizance to pay the costs, not only if he but if either of the other defendants be convicted (*e*).

The allowance there referred to is the allowance by the persons to whom the certiorari is directed (*f*).

Sect. 7 of 16 & 17 Vict. c. 30, did not apply to indictments against corporations (*g*).

(*z*) *R. v. Jonle* (1836), 5 A. & E. 539; *R. v. Hodges* (1845), 9 Jur. 665; *R. v. Morton* (1842), 1 Dowl. N. S. 543.

(*a*) *Anon.* (1731), 2 Barnard. 214; sub nom. *R. v. Hatchley Tradeley* (1731), 1 Sess. Cas. 180.

(*b*) *R. v. Wilson* (1844), 8 Jur. 1069.

(*c*) 2 Hawk. P. C. c. 27, 323; 1 Burn's J., tit. *Certiorari*, 30th ed.: *R. v. Palmer* (1856), 5 E. & B. 1024.

(*d*) *R. v. Inhabs. of Oxfordshire* (1811), 13 East, 411; *R. v. Jackson* (1795), 6 T. R. 145; *R. v. Unwin* (1839), 7 Dowl. 578; *R. v. Gwynne* (1759), 2 Burr. 749.

(*e*) *R. v. Jewell* (1857), 26 L. J. Q. B. 177.

(*f*) *Per* Patteson, J., in *R. v. Inhabs. of Abergyle* (1836), 5 A. & E. 795; *R. v. Dunn* (1799), 8 T. R. 217; *R. v. Jones* (1841), 9 Dowl. P. C. 504.

(*g*) *R. v. Mayor, &c. of Manchester* (1857), 26 L. J. M. C. 65.

Where the writ is improperly allowed, the allowance may be quashed on certiorari (*h*).

Unless the recognizance entered into by the prosecutor is in the form prescribed by the statute, the defendant on being acquitted cannot recover his costs against him. Thus where such a recognizance was conditioned to prosecute with effect and perform such things as the court might direct, it was held, that the defendants could not recover their costs against the prosecutor (*i*).

Recognizance to prosecute with effect, when satisfied.

The writ must not materially vary in its description of the record which it is intended to remove (*j*).

The writ ought to be directed to the magistrates or recorder of the court of quarter sessions before whom the proceedings were originally taken (*k*). When intended to remove an indictment or other matter from sessions, it is directed either to the justices generally, or to some of them in particular, and not to the *custos rotulorum* (*l*). In some cases it may be directed to the proper officer known to have the actual custody of the record (*m*). The writ does not operate till it has reached the hands of the officer to whom it is directed (*n*).

To whom the writ is directed.

It should be delivered to the chairman in open court, though if it appear that it came in any manner to the knowledge of the justices it must be obeyed by them (*o*). The 21 Jac. 1, c. 8, s. 4, requires that in cases of riot, forcible entry, or assault and battery, the certiorari for the removal of the indictment from quarter sessions should be delivered at the quarter sessions in open court (*p*).

After an indictment has been removed by certiorari into the King's Bench Division, it is in the discretion of a judge, if

(*h*) *R. v. Jones, ubi sup.*

(*i*) *R. v. Inhabit. of East Stoke* (1865), 34 L. J. M. C. 190.

(*j*) 2 Hawk. c. 27, s. 75; *R. v. Turk* (1847), 16 L. J. M. C. 114.

(*k*) 2 Hawk. c. 27, s. 38.

(*l*) *Ibid.* s. 40.

(*m*) *Ibid.* s. 38.

(*n*) *R. v. Chasemore* (1848), 12 Jnr. 11.

(*o*) 2 Hawk. c. 27, s. 57; *R. v. Battams* (1801), 1 East, 299.

(*p*) This section recites that bills of indictment of riot, forcible entry or of assault and battery being found before the justices of the peace at their quarter sessions of the peace are oftentimes removed from the counties where such indictments are found, by writs of certiorari unto them directed by or by means of the persons indicted, who well know that few or no persons grieved by such their outrages and misdemeanours whereof they stand so indicted will undergo the travel or charge of prosecution of such indictments so removed, by means whereof such offenders for the most part escape unprosecuted and unpunished, and the king loseth the fines which ought and should have been imposed upon them if such indictments had been prosecuted and not removed; and then enacts that all such writs of certiorari shall be delivered at some quarter sessions of the peace in open court, and that the parties indicted shall before the allowance of such certioraris enter into such recognizances as are in the section mentioned, otherwise the quarter sessions are to proceed with the trial of such indictments.

the proceedings are not continued, or upon all the facts, to order a writ of *procedendo*, under which the indictment may be sent back to the quarter sessions (*q*).

When issued and delivered to the quarter sessions for removing any record, indictment, or other proceeding, it supersedes the jurisdiction of that court, and renders all subsequent proceedings there illegal; unless the King's Bench Division by *procedendo* remands the record to them to be tried and determined.

The justices in sessions are bound to obey this writ on its production, even though they may suspect it to have been issued irregularly and improperly (*r*); but if it be for the removal of an indictment pending before them in session, and is not delivered till after the jury has been sworn for the trial of it, the sessions may proceed with it, and may set a fine to complete their judgment (*s*).

A party indicted at sessions for obstructing a highway obtained a certiorari, but, without informing the prosecutor that he had done so, gave notice of trial for a subsequent session. The prosecutor attended with his witnesses, and on the last day of the session, before the case was called on, the defendant lodged his certiorari. That writ was quashed, and a *procedendo* awarded under the circumstances; but the court declared they had no jurisdiction to give the prosecutor the costs of any proceedings out of their own court, *e.g.*, at the sessions after the certiorari had issued (*t*).

Affidavit in support of an Application by Defendant, for Certiorari to remove from Sessions an Indictment found for not repairing a Highway.

Form of affidavit in support of application for writ.

In the High Court of Justice, King's Bench Division (*u*).

A. B., of, &c., maketh oath and saith, that at the last general quarter sessions of the peace, holden in and for the county of L., a bill of indictment was preferred and found against the inhabitants of the parish of W. in the said county, for a nuisance in not repairing a certain common King's highway, leading from in the said county of L. towards and unto the town of H. in the county aforesaid, from a place called opposite, &c. containing in length three quarters of a mile, and in breadth thirty feet, extending from thence in a northern direction as far as W. church, in which said indictment it is alleged that the inhabitants of the parish of W. aforesaid ought to repair and amend the said King's

(*q*) *R. v. Scaife* (1852), 21 L. J. M. C. 221.

(*r*) *R. v. Battams* (1801), 1 East, 299.

(*s*) *R. v. North* (1696), 1 Salk. 144, and 2 Hawk. c. 27, s. 59; and see *R. v. Elwell* (1727), 2 Ld. Raym. 1515.

(*t*) *R. v. Higgins* (1836), 5 A. & E. 554; *R. v. Passman* (1834), 1 A. & E. 643, *sed contra*; *Jones v. Davies* (1822), 1 B. & C. 143; *Stacey v. Evans* (1824), 13 Pri. 449.

(*u*) Must not be entitled in any cause: *R. v. Nohro* (1823), 1 B. & C. 267; *R. v. Lewis* (1725), Stra. 704; but where the cause is in court by the proceeding being returned on certiorari, other affidavits must be entitled in the cause: *R. v. Jones* (1839), 8 D. P. C. 80.

common highway, when and so often as it shall be necessary; and the deponent saith that the *right or title to repair* the said highway will come in question upon the trial of the said indictment, as this deponent is advised and verily believes; and the determination of the said indictment may materially affect four other parishes similarly circumstanced, by reason of an Act of Parliament passed in the _____ year of the reign of his late Majesty King _____ intituled, "An Act," &c. (x). And this deponent further saith, he is advised and believes that it will be proper to have the said indictment tried by a special jury, and absolutely necessary that the jury before whom the said indictment is tried should, previous to the trial thereof, view the said highway, which special jury or view the defendants cannot have the benefit of at the quarter session of the peace.

Form of Certiorari to remove an Indictment from the Quarter Sessions into the King's Bench Division.

Edward VII., by the grace of God of the United Kingdom of Great Britain and Ireland and the British Dominions beyond the Seas King, defender of the faith, and so forth, To the keepers of our peace and to our justices assigned to hear and determine divers felonies, trespasses, and other misdemeanours committed within our county of _____, and to every of them, greeting: We being willing for certain reasons, that all and singular indictments of whatsoever felonies [*or misdemeanours*], whereof G. A. and M. O. are [*if indictment not yet preferred, add, or may be*] indicted before you (as it is said), be determined before us in the King's Bench Division of our High Court of Justice, and not elsewhere, do command you and every of you, that you or one of you do send, under your seals, or the seal of one of you, before us in our said court at the Royal Courts of Justice, London, all and singular the said indictments, with all things touching the same, by whatsoever name the said G. A. and M. O. are therein called, together with this our writ, that we may further cause to be done therein what of right and according to the law and custom of England we shall see fit to be done. Witness, _____, at _____, the _____ day of _____, in the _____ year of our reign.

By the Court.

First on the back of the form write the following words.

The execution of this writ appears by the schedule hereunto annexed.

The answer of W. esq., and the justices assigned to keep the peace in and for the county of _____.

County of _____ } I., J. P., chairman of the quarter sessions of the peace for
the said county of _____, and one of the justices of our
to wit. } sovereign Lord the King Edward the Seventh, assigned to
keep the peace in and for the said county, and also to hear and determine
divers felonies, trespasses, and misdemeanours in the said county committed, by virtue of this writ to me delivered, do, under my seal for myself, and other the justices assigned to keep the peace in and for the said county, humbly certify unto his Majesty, in the King's Bench Division of his High Court of Justice, the indictment of which mention is made in the said writ, together with all things touching the same.
Given at _____, the _____ day of _____, in the _____ year of the reign of King Edward the Seventh.

J. P. (L.S.)

Further forms will be found in the Appendix to the Crown Office Rules, 1886.

(x) See *R. v. Joule* (1836), 5 A. & E. 539. As to trial in the same county, see *ante*, p. 142.

SECTION 3.

OF THE INDICTMENT.

Commence-
ment of in-
dictment.

The indictment commences, *The jurors for our lord the King (z), upon their oath (a), present that*, and is sent to the grand jury, written on parchment, with the names of the witnesses indorsed.

When allow-
able.

It is a rule at common law that where the felony is such as several may join in, *e.g.*, housebreaking, larceny, &c., and it is believed that several have joined in committing it, in several degrees, *e.g.*, as principals in the first or second degree, or as accessories before or after the fact, they may all be indicted jointly (*b*); and the like in misdemeanours, where all are principals, *e.g.*, extortion, battery, &c. (*c*). So, though the several parties may have acted separately, if the grievance, *e.g.*, the nuisance, is the result of all their acts jointly, they may be joined in an indictment stating the acts to have been several (*d*). This is the more usual and convenient course: though a distinct indictment might, in point of law, be maintained against each, as all offences are, in their nature, several (*d*).

Nature of a
joint indict-
ment.

Such joint indictment, indeed, is in its nature several also; for the issues upon it are joined distinctly between the crown and each defendant, the defendants may plead in different ways, and although they plead similar pleas, may, in cases of felony, procure several trials by severing in their challenges. So, also, some may be convicted and others acquitted, except where the offence is one which cannot be committed by less than two, as conspiracy; or less than three, as riot; when if the jury acquit all the parties charged on the record but one in the first case, or two in the second, all must be acquitted, unless it is laid and found that the offence was committed with others to the jurors unknown. Thus, several may be joined in an indictment for publishing a libel, where all joined in the publication (*e*), and for obtaining money under false pretences, when all were present aiding and assisting in the common object of fraud (*f*). Three were *jointly* charged with procuring certain other persons to utter a forged will. The only

(z) The jurors intended are those mentioned in the caption: *R. v. Turner* (1839), 2 Moo. & Rob. 214, Parke, B. See as to "*of our lady the queen*," *Broome v. The Queen* (1848), 17 L. J. M. C. 152.

(a) This includes those who have made affirmation (51 & 52 Vict. c. 46, s. 6).

(b) 2 Hale, 173.

(c) *R. v. Benfield and Saunders* (1760), 2 Burr. 984.

(d) *R. v. Trafford and others* (1831), 1 B. & Ad. 874; *R. v. Atkinson et al.* (1705), Lord Raym. 1248.

(e) *R. v. Benfield and Saunders*, *sup.*

(f) *R. v. Young and others* (1788), 1 Lea, 505.

evidence for the crown was of *separate acts*, done at separate times and places by each of the persons charged as accessories; at the end of that evidence, one pleaded guilty. For the rest it was said, that only *one* could on the evidence be convicted. It was held, however, that the rest might be convicted (*g*). And several may be guilty of jointly using a gun on a Sunday, with intent to destroy game, against 1 & 2 Will. 4, c. 32, s. 3 (*h*).

But where the offence of each is entirely distinct in its nature, or arises out of some personal duty or omission, each ought to be separately indicted, or, at all events, severally charged. Thus indictments against two or more jointly for perjury, as common scolds, or for exercising a trade without serving an apprenticeship, are bad; for the acts complained of are essentially and necessarily several (*i*). And though several defendants may be included in one indictment for several distinct misdemeanours of the same kind, as for severally keeping disorderly houses (*k*), it is neither discreet nor proper; for the court might (at all events, before plea, or, as it seems, even before the jury is charged with them) quash such an indictment for any inconvenience shown to arise from the joinder of different counts against different offenders (*l*); or, if the objection is not made till after the jury has been charged, might put the prosecutor to his election (*m*). Objection to an indictment for improper joinder of defendants in it, is too late after verdict (*n*).

When not allowable.

Joinder not allowable, when.

If two or more be jointly charged with having committed a single offence, they cannot be separately convicted of separate parts of it, except by statute (*o*). But both may be convicted, or one only, and the other acquitted of the whole charge (*p*). On an indictment of two persons jointly for burglary and larceny, one may be convicted of burglary and larceny, and the other of larceny only (*q*).

(*g*) *R. v. Barber and others* (1844), 1 C. & K. 442.

(*h*) *R. v. Littlechild* (1871), L. R. 6 Q. B. 293. See *R. v. Clarke* (1777), per Lord Mansfield, Cowp. 610; Paley on Conv., ed. Macnamara, p. 262.

(*i*) *R. v. Phillips and others* (1731), 2 Stra. 921; *Anon.* (1703), 6 Mod. 210.

(*k*) 2 Hale, 174, cited *R. v. Kingston and others* (1806), 8 East, 46.

(*l*) *Ibid.*; see Lord Raym. 1248, ante, p. 146.

(*m*) See p. 149.

(*n*) *R. v. Hayes* (1838), 2 Moo. & R. 156.

(*o*) See *infra*.

(*p*) See *R. v. Hempstead* (1818), R. & Ry. 344; *R. v. Messingham* (1830), 1 Moo. C. C. 257. In *R. v. Harris, Balls and Moses* (1835), 7 C. & P. 416, three were jointly indicted at the Central Criminal Court for feloniously using plates containing impressions of forged notes. It was held that a singly using the plates by each of the three while alone would not suffice for a conviction; but the jury must select some one particular time after all three had become connected, viz., a time when they were all *present together* at one act, or assisting in such one act, as by two using and one watching at the door to prevent disturbance, and the like.

(*q*) *R. v. Butterworth* (1823), R. & R. 520.

Receivers of
stolen prop-
erty.

Any number of receivers of the same stolen property may be charged with substantive felonies in the same indictment.

By 24 & 25 Vict. c. 96, s. 93, whenever any property (as defined by the Act) whatsoever shall have been stolen, taken, extorted, obtained, embezzled or otherwise disposed of in such a manner as to amount to a felony, either at common law or by virtue of this Act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding that the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

On a joint indictment for receiving, persons may be convicted separately; and by 24 & 25 Vict. c. 96, s. 94, if upon the trial of any two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part or parts of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part or parts of such property. This section applies to a case where two prisoners are jointly indicted for receiving certain property, and the proof is that the one received the whole of the property at one time and place, and the other the whole of the same property at another time and place (*r*).

As to the joinder and non-joinder of accessories with the principal offenders, see 24 & 25 Vict. c. 94.

As to joinder
of offences.

In point of law, several offences, which may be tried by the same rules, and which in point of law have the same legal class and character—*i.e.* several felonies, or several misdemeanours—may be charged in several counts in one indictment (*s*). Thus counts for felony at common law may be joined with counts for felony by statute; counts for a felony with aggravations which render it capital, with counts for a felony which is not capital; counts for riots and aggravated assaults, punishable by hard labour, with counts for common assaults for which that punishment cannot be inflicted; and nothing in the Act for abolishing benefit of clergy (*t*) prevents the joinder in an indictment of counts which might have been joined before that Act passed. Where not only the degree, but the legal character of the offence is different, and the modes and incidents of trial differ, it is not usual to join a charge of felony with a charge of misdemeanour.

However, in *R. v. Jones* (*u*), where an indictment contained

(*r*) *R. v. Reardon* (1866), L. R. C. C. R. 31.

(*s*) 2 Hale, 173; 1 Chit. Crim. Law, 1st ed. 254; and *post*.

(*t*) 7 & 8 Geo. 4, c. 28, s. 6.

(*u*) (1839), 8 C. & P. 776.

several counts for felonious stabbing and one for a common assault, the objection for misjoinder was taken *late* in the case, and Williams, J., left the case to the jury on the other counts, without noticing that for assault. The verdict of "*Guilty*" was entered on a count for felony, on application of prosecutor's counsel. The fifteen judges held the conviction *right*. So where an indictment charged the felony of assaulting with intent to rob in one count, and misdemeanour of an attempt to rob in the second count, and the jury found a verdict of guilty of the first-named offence, the thief was punished accordingly; it was held not to be arguable on a case reserved, that, on objection taken in arrest of judgment, the indictment was bad (*x*).

One of the rules for framing an indictment is that the charge should correspond with the intended proofs; and though on the face of an indictment every count should import to charge a different offence, whether founded on the same or different facts, yet in practice the use made of the legal right to join several charges of *felony* is commonly no other than the charging the same offence in different counts of the same indictment in different ways, to meet the several aspects which it is apprehended the case may assume in evidence, or in which it may be regarded in point of law by the court, in order to satisfy that rule; *e.g.*, where it is doubted whether the goods stolen or the house in which a larceny was committed belong to or is occupied by A. or B., one count may state the goods, &c., as A.'s, and a second as B.'s (*y*); though the powers of amendment now conferred by statute may in many cases obviate the necessity in this particular instance. For if before the accused has pleaded, or the jury is charged with him, it is objected that an indictment for *felony* actually embraces charges of offences essentially distinct, the court might, in its discretion, quash the indictment (*z*); they will also quash it, even after the jury has been charged, if it appears clear that from legal defect the indictment cannot be sustained in arrest of judgment. If such joinder is only discovered after the jury is so charged, the court may, in its discretion, compel the prosecutor to elect on which charge he will proceed (*a*); but in misdemeanours the practice of quashing on account of the invalidity of the indictment, or of putting the prosecutor to elect, never seems to have existed (*b*). This is, however, now to be taken subject to the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 5, by which it is lawful to insert several counts in the same indictment

Rule that the charge should correspond with the proof.

Where offences distinct.

Prosecutor called upon to elect upon which charge he will proceed.

(*x*) *R. v. Ferguson* (1855), 24 L. J. M. C. 61.

(*y*) *R. v. Thompson* (1781), 2 East, P. C. 515.

(*z*) *R. v. Wilson and others* (1844), 14 L. J. M. C. 3; *Young v. R.* (in error) (1789), 3 T. R. 106; *Johnson's case* (1814), 1 Leach, 1105.

(*a*) *Young v. R.*, *sup.*; *R. v. Holman* (1862), L. & C. 177.

(*b*) Chitt. Cr. Pl. 251.

In larcenies.

against the same person for any number of distinct acts of stealing not exceeding three which may have been committed by him *against the same person* within the space of six months from the first to the last of such acts *and to proceed* thereon for all or any of them. Months in the above statute mean calendar months (*c*). The ordinary and proper course is to charge in the indictment that the three larcenies charged had been committed within the six months; but it is no objection either on motion to quash or in arrest of judgment or demurrer that such allegation is omitted, because there is no objection in point of law to putting several felonies in one indictment, though it is in the discretion of the judge to prevent a person being tried for several offences at one time (*d*). The duty to elect is also subject to sect. 71 of the same Act, which makes it lawful to charge in the indictment *and proceed* against the offender for any number of distinct acts of embezzlement or of fraudulent application or disposition not exceeding three, which may have been committed by him against the same master or employer within the space of six months from the first to the last of such acts.

In embezzlements.

In charges of stealing and receiving.

By sect. 92 of the same Act (*e*), in any indictment containing a charge of feloniously stealing any property, it shall be lawful to add a count or several counts for feloniously receiving the same or any part or parts thereof knowing the same to have been stolen, and in any indictment for feloniously receiving any property knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same: and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election; but it shall be lawful for the jury who shall try the same to find a verdict of guilty either of stealing the property or of receiving the same or any part or parts thereof knowing the same to have been stolen, and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property or of receiving the same or any part or parts thereof knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same, or any part or parts thereof, knowing the same to have been stolen.

Accessories before and at the fact and the receiver.

An accessory before the fact can now be indicted and tried in all respects as a principal felon (*f*), and there is no inconsistency in the same person being found guilty as an accessory

(*c*) 52 & 53 Vict. c. 63, s. 3.

(*d*) *R. v. Heywood* (1864), 33 L. J. M. C. 133.

(*e*) Larceny Act, 1861 (24 & 25 Vict. c. 96).

(*f*) 24 & 25 Vict. c. 94, s. 1; *R. v. Hughes* (1860), 29 L. J. M. C.

before the fact, and of being a receiver of the stolen goods (*g*). There is no objection therefore to indicting the receiver and the thief together as principals in one count for the larcenies, and in another as receivers, and thereupon a verdict of acquittal may stand as to the thief, and a general verdict of guilty as to the receiver (*h*); but where the evidence to prove the receiving shows circumstances which make the prisoner an accessory to the larceny, that is, a principal thief in the second degree, the prisoner cannot be convicted of receiving, which must be an independent act beyond the stealing (*i*). And even where a person was charged in the first count of an indictment with stealing certain goods, and in the second count with receiving the same *so as aforesaid* feloniously stolen, knowing them to have been stolen, and he was acquitted upon the first count and found guilty upon the second, the averment implied from the words *so as aforesaid* feloniously stolen, that the goods were stolen by him, was rejected as irrelevant, and the conviction was held good (*k*). So if in felony, charges requiring an essentially different state of facts to support them, though referring to the same transaction (*e.g.*, in former times robbery and assault with intent to rob), be joined, the court will, in general, compel the prosecutor to make similar election (*l*); but where the joinder is in respect of a count of robbing with a count for assaulting with intent to rob, an election would not now be required since the 24 & 25 Vict. c. 96, s. 41, *post*, p. 155.

Election in cases of felony.

But in cases of *misdemeanour* the discretion of the court is otherwise exercised; for in such cases no objection can be made in any way even to the joinder of counts applicable to different facts (*m*). Thus it is the constant practice to receive evidence of several assaults or libels on the several counts of the same indictment; and, on the other hand, an indictment for an assault by one or more *on several* is valid, though an award of a joint fine would be bad and the parties assaulted could not join in an action, when each person injured is to recover separate damages (*n*). So an assault with intent to ravish may be charged with a common assault,—a count for assaulting a peace officer in the execution of his duty with a common

Election in misdemeanours.

(*g*) *R. v. Hughes* (1860), 29 L. J. M. C. 71.

(*h*) *Ibid.*

(*i*) *R. v. Perkins* (1852), 21 L. J. M. C. 152.

(*k*) *R. v. Huntley* (1860), 29 L. J. M. C. 70.

(*l*) *R. v. Gough* (1831), 1 M. & Rob. 71.

(*m*) *Per* Lord Ellenborough, in *R. v. Jones* (1809), 2 Campb. 132. So conspiracy, and charges of other misdemeanours, may be joined: *R. v. Johnson* (1815), 3 M. & S. at p. 550.

(*n*) *Dictum* of Lord Mansfield in *R. v. Benfield and Saunders* (1760), 2 Burr. R. 980, 984, denying *R. v. Clendon* (1730), Lord Raym. 1572. *R. v. Benfield and Saunders*, an indictment against two for libel on two, held good.

The degree of offence to be charged.

The greater includes the less.

assault (*o*),—conspiracy with false pretences, false pretences and forgery at common law (*p*).

In applying the rule that the proof should correspond with the allegation, it must be borne in mind that the higher charge includes the less, and therefore the indictment should charge the highest offence which the evidence will sustain; and thus parties indicted for murder may be found guilty of manslaughter, and if indicted for burglary with a charge of larceny in the burglary count may be convicted of stealing in a dwelling-house or of simple larceny, according to the proof; or if indicted for larceny as a servant, may be convicted of simple larceny; or if for larceny in a dwelling-house to the value of 5*l.*, in the same manner of simple larceny; or upon an indictment for an assault occasioning actual bodily harm under the 47th section of 24 & 25 Vict. c. 100, of a common assault (*q*); or for unlawful and malicious wounding, of a common assault (*r*); or for an indictment for stabbing, cutting and wounding with intent to maim or to disable or to do some grievous bodily harm, of a common assault (*s*). And upon an indictment for assaulting and carnally knowing and abusing a girl between the age of ten and twelve years, of a common assault (*t*); or upon an indictment for an assault with intent to ravish, or to commit any other felony (such assault being a misdemeanour), of a common assault (*u*). But where it may be doubtful whether the aggravation of an offence will be proved, it is always well to insert a count without the aggravation on which without difficulty a verdict may be taken.

The necessity for accuracy in determining whether the charge should be of the graver or lighter class of offence is not now so great as formerly, when, if the indictment charged the full offence and the evidence showed only an attempt to commit it, or if a misdemeanour was charged and a felony proved, the prisoner was entitled to his acquittal (*x*); for now by 14 & 15 Vict. c. 100, s. 9, if, on the trial of any person charged with any felony or misdemeanour it shall appear to the jury upon the evidence that the defendant did not complete the

On charge of felony or misdemeanour, conviction may be had of attempt.

(*o*) *R. v. Finucane and another* (1833), *per* Parke, J., 5 C. & P. 551.

(*p*) *R. v. Collier* (1831), 5 C. & P. 160; *R. v. Moak* (1858), 27 L. J. M. C. 204.

(*q*) *R. v. Oliver* (1860), 30 L. J. M. C. 12; *R. v. Yeaton* (1861), 31 L. J. M. C. 70.

(*r*) *R. v. Taylor* (1869), L. R. 1 C. C. R. 194.

(*s*) *R. v. Walker* (1843), 2 Moo. & R. 446; *R. v. Stanton* (1851), 5 Cox, 324.

(*t*) *R. v. Guthrie* (1870), L. R. 1 C. C. R. 241. Note, that at this date the offence of carnally knowing a girl between the ages of ten and twelve was a misdemeanour only.

(*u*) Sect. 9 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), provides that upon the trial of any indictment for rape or any offence made felony by sect. 4 of that Act, the jury may find the prisoner guilty of an offence under sects. 3, 4 or 5 of that Act, or of an indecent assault.

(*x*) 2 Hale, 171; *R. v. Harmwood* (1787), 1 East, P. C. 411.

offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanour charged, but is guilty of an attempt to commit the same. And by sect. 12 of the same Act, "if upon the trial of any person for any misdemeanour it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanour; and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for felony on the same facts unless the court before which such trial may be had shall think fit in its discretion to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony—in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanour;" and again, by 24 & 25 Vict. c. 96, s. 88, if upon the trial of any person indicted for the misdemeanour of obtaining money, &c., by false pretences "it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanour; and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for larceny upon the same facts." And again, if upon the trial of any person upon any indictment for robbery it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted; but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob: and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he is tried (y).

So, by sect. 72 (z), if upon the trial of any person indicted for embezzlement or fraudulent application or disposition as aforesaid, it shall be proved that he took *the property in question* in any such manner as to amount in law to larceny he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement or fraudulent application or disposition, but is guilty of simple larceny; or of larceny as a clerk, servant or person employed for the purpose, or in the capacity of a clerk or servant, or as a person employed in the public service, or in police,

On misdemeanour no acquittal if felony proved.

In false pretences no acquittal if larceny proved.

In robbery conviction may be of assault with intent to rob.

In embezzlement conviction may be of larceny, or larceny as a clerk or servant, &c.

(y) 24 & 25 Vict. c. 96, s. 41.

(z) 24 & 25 Vict. c. 96.

In larceny conviction may be of embezzlement.

as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement or fraudulent application or disposition as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement or fraudulent application or disposition, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application or disposition; and no person so tried for embezzlement, fraudulent application or disposition or larceny as aforesaid shall be liable to be afterwards prosecuted for larceny, fraudulent application or disposition or embezzlement upon the same facts.

It is required under this section that the property in question in the indictment must be taken in such manner as to prove a larceny instead of an embezzlement, or *vice versá*, to justify the verdict of guilty of larceny on the indictment for embezzlement and *vice versá*; therefore it would seem not to reach a case where a servant, such as a foreman of a flour mill, employed to sell flour on credit or for ready money, who disposes of flour and conceals the transaction from his employer, receives the price from the purchaser and puts the money into his own pocket, and is afterwards indicted for larceny of the flour, inasmuch as his offence is embezzlement of the money and not larceny of the flour. In such a case he still would be entitled to be acquitted on such indictment, as there is neither larceny nor embezzlement of the flour (*a*).

Where upon an indictment for larceny embezzlement of the property in question is proved, the verdict must be not guilty of the larceny but guilty of embezzlement; and it will not do for the jury to find a verdict of guilty upon the indictment (*b*).

In felonious poisoning, &c. conviction may be of misdemeanour, poisoning, &c. with intent to injure only.

And again, by 24 & 25 Vict. c. 100, s. 25, if upon the trial of any person for the felony of administering poison or other destructive or noxious thing so as thereby to endanger life, or so as thereby to inflict upon such person any grievous bodily harm, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of the misdemeanour of administering poison or other destructive or noxious thing with intent to injure, aggrieve or annoy such person, then and in every such case the jury may acquit the accused of such felony and find him guilty of such misde-

(*a*) See *R. v. Betts* (1859), 28 L. J. M. C. 69.

(*b*) *R. v. Gorbitt* (1857), 26 L. J. M. C. 47.

meanour; and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanour.

If, however, a bill is thrown out, or if a party is acquitted on a charge of felony, merely on the ground that the proof establishes an act short of the felony *charged* (not being an indictment for robbery upon which it appears to the jury that the defendant did not commit the robbery, but did assault with intent to rob, in which case the latter verdict may be returned (*c*), or an indictment for a felony or misdemeanour where an attempt to commit is proved, or a felonious poisoning and a misdemeanour of the same nature is proved, or in any other like cases met by statute, as above mentioned), he may be again indicted for it, if it amounts to a misdemeanour, or for felony, if the crime is in fact a distinct felony (*d*); and in these cases the court will order him to be detained, in order to give an opportunity for preferring a better indictment to a subsequent grand jury (*e*). This is often the only course to effect the ends of justice: *e.g.*, in a case where, from the uncertainty of being able to prove the false pretences, so as to take advantage of 24 & 25 Vict. c. 96, s. 88, the prosecution is for larceny, and fails on the ground that the money, &c. was obtained under a particular false pretence first sworn to by the prosecutor at the trial, or by a conspiracy to defraud him; and the like is the case where the indictment be for false pretences, the proof of which fails, but a conspiracy to defraud appears.

Preferring
second indict-
ments.

Before preferring a second indictment after an acquittal of the prisoner on the first, the proper course is take the party again before a magistrate, who will hear the witnesses again, and bind them over to appear at the next sessions, where a fresh bill may be preferred to the grand jury (*f*).

Though an indictment, according to Lord Hale, should be "a plain, brief and certain narrative of an offence committed by some person, and of the necessary circumstances that concur to ascertain the fact and its nature," it is extremely difficult to trace anything like principle in the application of this rule; for though we find it laid down, generally, that the charge must be certain and definite in allegation, in order that the party charged may know the particulars of the accu-

Allegations
unnecessary to
be proved.

(*c*) 24 & 25 Vict. c. 96, s. 41.

(*d*) *E.g.*, if first indictment be for mere burglary, with intent to steal, and fails, a second may be for the larceny though committed at same time: for they are several offences, as burglary may be when there is no larceny, and *vice versa*; so a man acquitted of stealing a horse has been arraigned and convicted of stealing the saddle, though both were done at the same time: 2 Hale, P. C. 244—246.

(*e*) See *ante*, p. 133; 4 Bla. C. 305; Bac. Abr. tit. *Indictment* (D. 2). As to *autrefois acquit*, see *post*.

(*f*) 4 Bla. C. 305.

sation which he is called on to answer (*g*), yet formerly many allegations were required on this ground which might be wholly untrue in fact. For instance, it was necessary to allege in the body that every material fact occurred at a certain time and place (*h*), in order, as it was said, to show that the grand jury had jurisdiction to find the bill, and that it might be known whence the petty jury are to come who are to try it; yet, at the trial, the fact may be shown to have occurred at any other time whatever, or (except in cases where local description is requisite) at any other place within the jurisdiction of the court; besides that since 6 Geo. 4, c. 50, s. 12, the jury is no longer of the *visne*. Again, it was necessary to allege the number, quantity and value of articles stolen or embezzled; and yet it was quite immaterial whether in these respects the proof corresponded with the allegation (*i*); and now, by 14 & 15 Vict. c. 100, s. 24, it is enacted, that "No indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute,' instead of 'against the form of the statutes,' or *vice versá*, nor for that any person mentioned in the indictment is designated by a name of office or other descriptive appellation instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, nor for want of a proper or perfect venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for want of the statement of the value or price of any matter or thing or the amount of damage, injury or spoil in any case where the value or price or the amount of damage, injury or spoil is not of the essence of the offence." And, indeed, prior to this most of such apparent defects had been cured after verdict or judgment, after plea or otherwise, by 7 Geo. 4, c. 64, s. 20; see *post*, "Judgment." The want of a *similiter* is cured also after verdict by 7 Geo. 4, c. 64, s. 21.

Defects in indictment cured by statute.

Further rules

It is almost as difficult to lay down any general rules

(*g*) *R. v. Rowed* (1842), 3 Q. B. 180.

(*h*) *R. v. O'Connor* (1843), 13 L. J. M. C. 33, 36. If place is necessary to be stated and is omitted, *semble*, the indictment is bad in arrest of judgment, notwithstanding 14 & 15 Vict. c. 100, s. 23.

(*i*) If an indictment charges the stealing of *nine* books, proof of stealing *one* is sufficient for conviction: *per* Lord Ellenborough, *R. v. Johnson* (1815), 3 M. & S. 548.

applicable to the framing of indictments as to extract anything like principle from the decisions respecting it. The best rules that can be given in addition to the first rule which we have already discussed (*viz.*, that the charge should as nearly correspond with the intended proofs in all respects as possible) are, secondly, that where the means of committing the offence are of the essence of the charge, as in obtaining money by false pretences, those means should be specified truly (*j*); thirdly, that where the law has applied particular terms of art to the description of a crime (as "*feloniously*" (*k*), "*wilfully*" (*l*), "*of malice aforethought*," "*burglariously*" (*m*), &c.) they should be carefully inserted, as it is not sufficient to use equivalent expressions; fourthly, that where an indictment is founded (*n*) on a statute, the language of the statute should be accurately followed (*o*), and the offence stated to be "contrary to the form of the statute in such case made and provided" (*p*); fifthly, that all inconsistency and repugnancy should be avoided; for although an averment which is altogether superfluous may be rejected as surplusage, for *utile per inutile non vitiatur* (*q*), yet if an averment be part of the description of the offence, or be embodied by reference in such description, it cannot be so rejected, and its omission will be fatal. It may, however, be observed, in the language of Lord Ellenborough, that "except in particular cases where technical expressions are required, there is no rule that other words should be employed than such as are in ordinary use, or that in indictments or other pleadings a different sense is to be put on them than what they bear in ordinary acceptation; and if, where the sense be ambiguous, it is sufficiently marked by the context or other means in what sense they are intended to be used, no objection can be made on the ground of repugnancy, which only exists where a sense is annexed to words, which is either absolutely inconsistent therewith, or, being apparently so, is not accompanied by anything to explain or define them. If the sense be clear, nice exceptions ought not to be regarded" (*r*):

for framing
indictments.

Statement of
the means.

Words of art.

Descriptive
averments
material.

(*j*) *R. v. Mason* (1788), 2 T. R. 581. See *R. v. Goldsmith* (1873), L. R. 2 C. C. R. 74; see *R. v. Nott* (1843), 12 L. J. M. C. 143, *per Williams, J.*

(*k*) *R. v. Gray* (1864), 33 L. J. M. C. 78.

(*l*) *R. v. Davis* (1788), 1 Leach, 493.

(*m*) *Holford v. Bailey* (1849), 13 Q. B. 446. See *R. v. Gray, sup.*

(*n*) Fost. Cr. L. 423, 424.

(*o*) *R. v. Davis, sup.*

(*p*) But the absence of this or any other proper or formal conclusion will not now vitiate the indictment: 14 & 15 Vict. c. 100, s. 24. If the offence is indictable at common law, the addition of these words will be rejected as surplusage.

(*q*) See *R. v. Kealey* (1851), 20 L. J. M. C. 57.

(*r*) See *R. v. Stevens and Agnew* (1804), 5 East, 259. Also 1 Chit. C. L. 173. Lord Hale inveighs against these "unseemly neectics," 2 Hale's P. C. 193.

Words of
reference.

thus the word *until* may be construed to be inclusive or exclusive of the day to which it is applied, according to the context and subject (*s*), and the statement may be either according to the fact, or to the legal operation (*t*).

The words *said*, *aforesaid*, *same*, and *there*, generally refer to the last antecedent, if the matter itself, viz. that which makes sense of the indictment, and is its reasonable construction, does not hinder (*u*). The last antecedent, says Tindal, C. J., is the last word which can be made an antecedent, so as to have a meaning (*x*), and reference may be so made to a former count (*y*). The words, "the said E. R." in a second count, applying to a person mentioned in the first count, imply that it is the same person merely, and do not incorporate the description of the person, as that she was a female child between ten and twelve years of age (*z*). The words "property aforesaid before then feloniously stolen" in a count for receiving, following a count for stealing the same goods, do not include the description of the person by whom they were alleged to be stolen (*a*). And the words "so as aforesaid feloniously stolen," similarly placed, carry no further meaning (*b*); and in such case the words "so as aforesaid" may be rejected as irrelevant (*c*). So a count against a receiver alleged that *Francis Morris* received, and proceeded to allege that the said *Thomas Morris* well knew the same to be stolen, and it was held that the words "the said Thomas Morris" could be rejected (*d*). Where the first count described the wife of the defendant, and the third count mentioned "the said wife" of the defendant, it was held that this sufficiently referred to the person mentioned as his wife in the first count (*e*). An indictment will be bad where a relative refers with equal uncertainty to two antecedents (*f*). *Same* is more explicit, and may be said always to apply to the last antecedent, though *said* does not necessarily

(*s*) *R. v. Stevens*, *sup.*

(*t*) Thus, under the repealed Act 3 & 4 W. & M. c. 9, s. 5, it was held no objection to state that the lodging stolen from was let by the owner's wife, though such a letting was in law a letting by the husband: *R. v. Healey* (1824), 1 Moo. C. C. 1.

(*u*) *R. v. Wright* (1834), 1 A. & E. 434. See Co. Lit. 20; *R. v. Countess-thorpe* (1831), 2 B. & Ad. 487; *Spyer v. Thelwell* (1835), Tyr. & G. 191; 4 How. St. Tr. 747.

(*x*) *R. v. Wright*, *sup.*

(*y*) *R. v. Waverton* (1851), 21 L. J. M. C. 7.

(*z*) See *R. v. Martin* (1840), 9 C. & P. 215.

(*a*) *R. v. Hughes* (1860), 29 L. J. M. C. 71.

(*b*) *R. v. Huntley* (1860), 29 L. J. M. C. 70; *R. v. Craddock* (1850), 2 Den. C. C. 31.

(*c*) *Ibid.*

(*d*) *R. v. Morris* (1774), 1 Lea. 109; *R. v. Crespin* (1848), 17 L. J. M. C. 128; *post*, pp. 160, 162.

(*e*) *R. v. Dent* (1843), 1 C. & K. 249.

(*f*) *R. v. Graham* (1772), 1 Lea. C. C. 87.

do so (*g*). “*So as aforesaid*” may be rejected as irrelevant (*h*). “*Then*” (*ad tunc*) means the very time at which the event referred to happened; it therefore involves the same day: and such is the known sense of the word in pleading. But of “*instantly*,” the more natural and usual sense is instantly *after*; the pleader may mean five minutes, an hour, some time on the succeeding day, or even a longer time. In precedents the words “*instantly*” and “*incontinenter*” do not dispense with a direct allegation of time (*i*).

Though every crime should appear charged on the face of the record with scrupulous certainty (*k*), *i.e.* so as to support itself by its own expressions, yet an omission of a letter, which does not change the word into another of a different meaning, as undertood for understood, receivd for received, depaired of for despaired of, Segrave for Seagrave, &c., would never have avoided an indictment (*l*).

Clerical errors.

Where the offence charged has been created or subjected to greater degree of punishment by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute (*m*). And this has been held to apply where the objection was taken after plea, and before trial or verdict, and the objection overruled and a verdict taken (*n*). Error, however, still lies, if the indictment, though following the words of the statute, is bad by the general rules of law and not merely defective in such a manner as that the issue found upon it required such proof at the trial as that the verdict must be taken to have cured it (*o*). For there may be cases in which, although the statutory form of words is followed, an offence would not be charged with sufficient precision (*p*). For instance, in an indictment under the Black Act (9 Geo. 1, c. 22), which spoke in general terms of “cattle,” it was necessary to specify the kind of cattle which the prisoner was indicted for having wounded (*q*).

Indictment cured by verdict, when.

Indictment following words of statute.

(*g*) *Per* Powell, J., *R. v. Rhodes* (1703), 2 Lord Raym. 888.

(*h*) *R. v. Huntley*, *sup.*

(*i*) *Per* cur., *R. v. Brownlow* (1839), 11 A. & E. 119.

(*k*) 1 Chit. Cr. L. 172, 1st ed.

(*l*) *Beech's case* (1774), 1 Lea. C. C. 133; *R. v. Hart* (1776), *ibid.* 145.

(*m*) 7 Geo. 4, c. 64, s. 21.

(*n*) *R. v. Goldsmith* (1873), L. R. 2 C. C. R. 74.

(*o*) *R. v. Martin* (1838), 8 A. & E. 481; and see the cases on the Polish notes, *R. v. Moses*, &c., 7 C. & P. 416; and *per* Coleridge, J., in *R. v. Nott* (1843), 12 L. J. M. C. 143.

(*p*) See *per* Lord Denman, 8 A. & E. 486; *R. v. Norton* (1838), 8 C. & P. 196.

(*q*) *R. v. Chalkley* (1813), R. & R. 258. Another instance in which it will not suffice to lay the offence charged in the words of the Act which creates it, is that of a woman who endeavours to conceal the birth of her child by “disposing” of its body otherwise than by “secret burying” it; in which case, the manner in which it was “disposed of” must be stated: *R. v. Hounsell* (1840), 2 Moo. & R. 292,

Terms of the same legal import as those used in the statute seem to suffice (*r*).

Whatever may have been intended by these provisions, they appear not to apply to any objection which, before they were enacted, might be taken at the trial or raised on demurrer; but merely to objections made *in stay or reversal of judgment*. In practice, therefore, it would not be safe to act on them in framing indictments; the requisites of which must be considered as before, though the above sections may be useful in preventing objections made *after* verdict, viz., in arrest of judgment (*s*).

Tautology.

Words merely tautologous will be rejected if the indictment is in other respects good in itself (*t*); and an indictment which is bad, from its sense being obstructed by particular words, may be made good by rejecting them as insensible and useless (*u*).

The indictment will be good, though after the words "in manner and form following," "that is to say," or "as follow, that is to say," an instrument be not recited verbatim (*x*), if its effect only is intended to be set out, for then the substance is sufficient (*y*).

Where an act is in itself unlawful, allegation of evil intent is matter of form not necessary to be proved by extrinsic evidence. But if an evil intent accompanying a particular act is necessary to constitute that act a crime, the intent must be laid in the indictment, and proved; but it is sufficient to allege it in the prefatory part (*z*).

Parts of the indictment.

The chief points common to all indictments are—

1. The commencement (*i.e.*, the venue, and presentment of grand jury);
2. The description of the accused (*i.e.*, name, addition, mystery, &c.);
3. The statement of the time when the offence was committed;
4. The statement of the place where the offence was committed;

Maule, J. So "entering land by night for the purpose of destroying game" is not completely laid without adding "there," though that word is not in the Act: *Fletcher v. Calthrop* (1845), 6 Q. B. 880; but this case has been reflected upon in *Curton v. R.* (1861), 30 L. J. M. C. 149.

(*r*) *R. v. Grevil* (circ. 1664), 1 Anderson's Rep. 195.

(*s*) See *R. v. Goldsmith* (1873), L. R. 2 C. C. R. 74. The proper course for the prisoner would seem to be to raise the objection either by demurrer or by motion to quash before plea.

(*t*) *R. v. Morris* (1774), 1 Lea. 109; *R. v. Crespin* (1848), 17 L. J. M. C. 128; see *ante*, p. 158, *post*, p. 162.

(*u*) *R. v. Redman* (1787), 1 Lea. 477.

(*x*) *R. v. May* (1779), 1 Lea. 192; *R. v. Hart* (1776), 2 East, P. C. 978.

(*y*) *Curton v. R.* (1861), 30 L. J. M. C. 149.

(*z*) *R. v. Phillips* (1805), 6 East, 464.

5. The description of the person against whom or whose property the offence was committed;
6. The statement of the offence itself;
7. The statement of the means by which the offence was committed;
8. The conclusion.

1. An indictment, as we have seen already, commences Venue. thus:—"Herefordshire (to wit).—The jurors for our Lord the King upon their oath present that"—

The *venue*, that is, the county, borough and county of a corporate city or town, or other borough or place where the indictment is found, and for which the sessions are holden, and over which the court has jurisdiction, as considered in the last chapter, is expressed in the margin. Stat. 7 & 8 Vict. c. 61, s. 4, provides against *any judicial proceeding* being invalidated by any error in stating the name of a county to which a detached part of it annexed by that Act to another county originally belonged, instead of the county to which it would belong under that Act or conversely. The omission of the words *to wit*, though unusual, seems immaterial (*a*). It was also proper to allege, in the body of the indictment, that every fact material to the charge took place, not only in the county or borough in which the indictment is preferred, *i.e.*, that laid in the margin (which may suffice, if the offence is not one in which local description is of the essence of the charge (*b*)), but also at some specific parish, hamlet, town, vill or place within that county or borough, from which parish, &c., before 6 Geo. 4, c. 50, s. 12, a jury of the visne or neighbourhood might have come (*c*). For if *all* allegation of place was omitted there, and no special reference to the county or borough, &c. in the margin made, the indictment was formerly bad on demurrer, and also in arrest of judgment, notwithstanding 7 Geo. 4, c. 64, s. 20 (*d*); for that Act by the words "want of a *proper* or *perfect* venue" did not intend to cure defects of venue, unless the jurisdiction in respect of locality of the court in which the indictment is found, is made to appear in the body of it. The allegation that facts material to the charge occurred in a particular county was held necessary as not only that which authorises the grand jury to entertain the bill, but was also the warrant for the sheriff to summon the petty jury who must pass between the crown and the prisoner (*e*): but now, by 14 & 15 Vict. c. 100, s. 23, it is not

(*a*) See the precedent of a caption in 2 Hale, 165.

(*b*) *Post*, p. 166.

(*c*) See *post*, *ibid*.

(*d*) Rep. 36 & 37 Vict. c. 91 (S. L. R.).

(*e*) *R. v. O'Connor* (1843), 13 L. J. M. C. 33, 36; 1 Hale, 652; 2 Hale, 166; Cro. El. 101, 606, 751; 2 Hawk. c. 25, s. 34, p. 128.

To prevent the inconvenience of troubling one person for another, it was enacted by the statute of additions (*p*), that in all indictments on which process of outlawry lies, additions shall be made to the *defendants'* names, of their state or degree, or mystery, and of the towns or hamlets, or places, and the counties of the which they be or were or be or were conversant; but this statute though not expressly repealed is practically obsolete since the stat. 7 Geo. 4, c. 64, s. 19 (*post*, p. 209), which enables the court to amend the indictment according to the truth upon a plea in abatement, and 14 & 15 Vict. c. 100, s. 24, which provides that no indictment shall be insufficient for the want of or imperfection in the addition of any defendant.

Additions to the defendant's name practically obsolete.

Gentleman, and esquire, were good additions under that statute for the estate and degree of a man, gentlewoman for that of a woman, clerk for a clergyman, or graduate at Oxford or Cambridge; yeoman was a good addition for the estate and degree of a person having freehold land of 40s. a year (*q*); and labourer for that of a man; but neither yeoman nor labourer were good additions for that of a woman; and widow, single-woman, wife of and spinster, were good additions of the estate and degree of a woman; but burgess, and citizen, and servant, are all of them too general, and therefore not good additions of the estate or degree either of a man or woman (*r*).

In indictments against the greater nobility—that is, says Lord Coke, dukes, marquises, earls, viscounts and barons, being dukes, &c. of particular counties or places—the estate and degree is named first, and afterwards the town or county: thus, *Edward, Duke of Buckingham, late of N. in the county of G.*—omitting the family surname of the accused, but if stated it does not vitiate (*s*); and so it is when one is named of a city which is a county of itself, *I. S. pannarius de London in com. civitatis London.* But in case of the lesser nobility, as bannerets, baronets, and knights, and all under them, the town and county are named before the addition, thus, “A. B. of in the county of knight.” Garter, principal king at arms, and *clarenceux*, being titles conferred by the crown, are not additions, but parts of the name which should follow it (*t*). Foreign dignities give no man here higher title than that of esquire, unless the possessors be lords or knights here, in which case they should be described accordingly (*u*).

(*p*) 1 Hen. 5, c. 5, A.D. 1413.

(*q*) 1 Bla. C. 406.

(*r*) Hawk. b. 2, c. 23, s. 111; 2 Inst. 668; 2 Hale, P. C. 176; Ld. Raym. 1179; *R. v. Checketts* (1817), 6 M. & S. 88.

(*s*) See as to description of a peer being the party injured, *post*, p. 168.

(*t*) *Holt v. Ward* (1729), 2 Stra. 850; *Detthick's case* (1597), Cro. El. 542.

(*u*) 2 Inst. 665, 667, 669.

A variance in stating marquis for earl, or knight for baronet, was formerly fatal, for the dignity is not merely an addition, but being the very appellation by which the party is commonly known, becomes on that account actually part of his name (*x*).

The word *mystery* includes all lawful arts, trades, and occupations; and if one, under the degree of a gentleman, has divers of such arts, trades, or occupations, he may be named by any of them (*y*).

With respect to residence, it is a good addition of this kind to name the party *late* of a parish named (*z*), in which respect this addition differs from that of the *estate, degree* or *mystery*.

3. The time when the offence is alleged to have been committed is usually stated thus:—"On the day of June in the year of our Lord." The day of the month and the year when the offence was committed is stated, in order that the party may be able to defend himself against a second charge for the like offence (*a*); though it is not necessary to sustain the precise allegation in proof, in any case where time is not of the essence of the offence (*b*); but it is material to show that the prosecution was commenced in due time, where it is enacted that it shall be commenced within a particular time (*c*). It is not, however, necessary to allege *time* to any charge of mere negation or omission (*d*). Formerly, if in an indictment the offence was laid on an uncertain or impossible day, or on a future day, or on different days, or on such a day as rendered the indictment repugnant to itself, the objection was fatal, either on demurrer or in arrest of judgment even after verdict; and though such objection has long since been cured by verdict (*e*), it was still open to the defendant to raise it before plea by way of demurrer, or on motion to quash the indictment until such objection was made no longer available by 14 & 15 Vict. c. 100, s. 24. If time is material to constitute a statutable offence, the time stated in the indictment will on motion in arrest of judgment be taken as the true time. Thus, where it was made a statutory misdemeanour to exhibit lights to persons at sea "between September and April," an allegation that the defendant exhibited lights *on the 9th March*, was held sufficient without specifically averring that he did so "*between* September and April" (*f*); and

(*x*) 2 Hawk. c. 25, ss. 71, 72.

(*y*) 2 Inst. 668.

(*z*) *Ibid.* 669.

(*a*) *R. v. Catherall* (1730), Stra. 900.

(*b*) 14 & 15 Vict. c. 100, s. 24, *ante*, p. 156.

(*c*) See *R. v. Wallace* (1797), 1 East, P. C. 186; *R. v. Chandler* (1700), 1 Ld. Raym. 582; *R. v. Simpson* (1713), 10 Mod. 248.

(*d*) *R. v. Hollond* (1794), 5 T. R. 616.

(*e*) 7 Geo. 4, c. 64, s. 20 (rep. 36 & 37 Vict. c. 91, S. L. R.).

(*f*) 6 Geo. 4, c. 104, s. 52; *R. v. Brown* (1828), M. & M. 163. See note to *Harding v. Stokes* (1836), Tyr. & Gr. 605.

if the dates are material, but are laid under a *videlicet*, it will be taken after verdict that they were proved as laid (*g*). It seems that where an offence is laid as contrary to the form of a statute, it is not necessary to state it to have been committed "after the passing of the Act," though it took place very recently before, if the time when it took place is laid and proved to be after the Act passed (*h*). If, in point of fact, an offence is committed after a day fixed by a statute, as that on and after which an offence may be laid and tried as if committed in the county in which the offender is apprehended, and the statute does not vary the nature and character of the offence, the having laid the day in the indictment before the day fixed by the statute will not vitiate (*i*). In criminal pleading the word "*being*" (*cristens*) will, unless necessarily connected with some other matter (*e.g.*, by the word *then*), relate to the time of the indictment rather than of the offence (*k*).

It is not necessary to state the hour of committing the offence, except where its indictable nature or character is made by statute to depend on the hour of its being committed. Thus, as burglary must be committed in the night-time and could not be committed in twilight, it was held necessary in cases of that offence to allege a certain hour in the night at which it was committed, in order that the fact might appear on the face of the indictment to have been done after the twilight of the evening, and before that of the morning (*l*). To put an end to this technical difficulty, it was provided (*m*), that so far as the same is essential to the offence of burglary, the night shall be considered to commence at nine of the clock in the evening of each day, and to conclude at six of the clock on the morning of the next succeeding day. This enactment has been repealed, but virtually re-enacted by 24 & 25 Vict. c. 96, which fixes the same hours to be deemed to be night for the purposes of that Act (sect. 1). In indictments on the above enactment the offence should still be stated as committed on or about some hour certain between the above hours, adding, "in the night of the same day;" though in *Davies and others v. The King (in error)* (*n*), the court appeared to approve the argument, that in an indictment on 9 Geo. 4, c. 69, s. 9, for unlawfully by night entering, or being armed on any land for the purpose of destroying game, it was unnecessary to mention the hour of the night; that period, as

(*g*) *R. v. Scott* (1856), 25 L. J. M. C. 128; *Ryalls v. R.* (1849), 18 L. J. M. C. 69.

(*h*) See judgment of Parke, B., in *Harding v. Stokes, sup.*

(*i*) *R. v. Treharne* (1831), 1 Moo. C. C. 298.

(*k*) See 1 Ch. Cr. L. 2nd ed. 220, and *R. v. Silversides* (1842), 3 Q. B. 408.

(*l*) *R. v. Waddington* (1771), 2 East, P. C. 513; 1 Hale, 519; 2 Hawk. c. 25, ss. 76, 77.

(*m*) 7 Will. 4 & 1 Vict. c. 86, s. 4.

(*n*) (1829), 10 B. & C. 89.

far as relates to the purposes of that Act, having been fixed by a separate section (o) to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise; but that case turned principally on another ground.

Description of place.

4. The old formula, in alleging the place where the offence was committed, was:—"At the parish of _____, in the county of _____" (p), or in reference to the previous description of the prisoner, "at the parish aforesaid, in the county aforesaid." If the offence was committed on the boundary or boundaries of two or more counties, or within 500 yards of the boundary, &c. of the county where the indictment is to be tried, or if it was begun in one county and completed in another, it should be laid in the county where the trial is to be, "in the same manner as if it had been actually and wholly completed therein" (q); so that if not tried in the county where the fact actually happened, the parish laid may be that in which the prisoner is tried.

It is essential to the validity of the indictment where *local description* is of the essence of the offence, to lay every material fact to have taken place at some specific parish or place situate within the county or borough, &c. stated in the margin; as in cases of nuisance to highways, keeping disorderly houses, arson, burglary, housebreaking, stealing in the dwelling-house (r), being found by night armed with intent to break into a dwelling-house and to commit a felony therein (s); being armed at night in a close for the purpose of killing game, forcible entry, &c. In other offences it will be sufficient to show them to have in fact occurred at any place within the same jurisdiction, though other than that laid; the original reason for this particularity having long since ceased to operate. It was formerly considered desirable that the jury who should try the offence should come from the *visne* or neighbourhood of the place where it was committed, in order that they might be familiar with the parties and the circumstances; whereas in modern times not only is the *venire* awarded from the body of the county (t), but it is usual cautiously to abstain from swearing jurors who happen to come from the neighbourhood of the transaction, lest they should bring local prejudices to the trial of the issue, and decide from other sources than the evidence given on oath.

(o) 9 Geo. 4, c. 69, s. 12.

(p) The court takes judicial notice that a parish so laid is in England: *R. v. Sharpe and Paul* (1838), 8 C. & P. 436.

(q) 7 Geo. 4, c. 64, s. 12, *ante*, p. 130.

(r) It is enough to lay a house to be in parish of B., though it is divided for ecclesiastical purposes into three districts, each called a parish: *R. v. Howell* (1839), 9 C. & P. 437. Littledale, J.

(s) *R. v. Jarrauld and another* (1863), 32 L. J. M. C. 258.

(t) 6 Geo. 4, c. 50, s. 13, *ante*, p. 94.

And now, where the offence does not require local description by 14 & 15 Vict. c. 100, s. 23, the venue in the margin is to be taken to be the venue for all the facts stated in the body of the indictment (*u*).

Where a parish is situate in more than one county, it is proper to allege the offence to have been committed "*in that part of the parish of A. which lies in the county of B.*;" but "*in the parish of A., in the county of B.*," is sufficient (*x*), except in cases requiring local description, as housebreaking (*y*). By 7 & 8 Vict. c. 62, s. 4, no *judicial proceeding* is invalidated by reason of any error in stating the name of the county to which a detached portion [attached to another county by sect. 1] originally belonged, instead of the county to which it will belong under sect. 1; or the converse.

5. The indictment must be so certain as to the party against whom the offence was committed, as to enable the prisoner to know and understand who that party is, and what charge he is called on to answer (*z*). The property wrongly taken must be laid in some person (*a*); but an indictment for *attempting* to steal "the goods and chattels" of the prosecutor, without specifying or describing them, was held sufficiently certain, and not liable to be quashed (*b*); but an indictment upon 24 & 25 Vict. c. 96, s. 58, for being by night armed with weapons with intent to break into a dwelling-house and commit a felony therein, must state the ownership of the house, to prevent the prisoner being taken by surprise, for the statute meant to require that the intention should have reference to a particular house (*c*), because it intended to require proof of an intention to break into some particular definite dwelling-house and commit some definite felony; and proof of a general intention to break into houses is not sufficient. The names of the owner of the property taken or injured being a matter of description must be strictly proved as laid, and there is no obligation in the court to amend under the statute. In describing a peer the christian name when known should be set forth, followed by the style and title, if a peer or peeress (*d*); but the addition of the surname will not render it insufficient (*e*); but if a person has a title of office or dignity, as "His Royal Highness the Duke of Cambridge," and there is a doubt as to the capability

Parish situated in more than one county.

Description of person against whom the offence is committed.

(*u*) See the section cited "Venue," *ante*, p. 161.

(*x*) *R. v. Perkins* (1830), 4 C. & P. 363.

(*y*) *Per Patteson, J., R. v. Brookes* (1842), C. & M. 543. However, it would then be sufficient to convict on for the *larceny*.

(*z*) 2 Curw. Hawk. 319.

(*a*) *R. v. Marsh* (1849), 19 L. J. M. C. 12.

(*b*) *R. v. Johnson* (1864), 34 L. J. M. C. 24.

(*c*) *R. v. Jarrald* (1863), 32 L. J. M. C. 258.

(*d*) *R. v. Pitts* (1839), 8 C. & P. 771, *per* Erskine, J., after consulting the judges; *Willion v. Berkley* (1560), Plowden's R. 223.

(*e*) *Ibid.*

Titled
personages.

Misspellings.

Party
unknown.

of proving his christian names, it is better to leave out the christian names and describe him by his title of dignity only (*f*); but except where the dignity is a necessary part of the description, no addition is requisite, as the statute of additions applies to *defendants* only (*g*). An Irish peer not sitting in the English House of Lords cannot prosecute by his title of dignity, but should be described by his proper name, with addition of degree and title, as James Hamilton, Esq., Earl of Clanbrassil, in that part of the United Kingdom called Ireland (*h*). And if a party be so described that he cannot be mistaken, the description will suffice; and therefore an indictment for an assault on "John, parish priest of D.," was held sufficiently certain (*i*); an indictment for larceny, laying the goods stolen as the property of Victory Baroness Turkheim, by which style the prosecutrix was known, was held good, though her real name was Selina Victoire (*k*); and where the prosecutor, a foreigner, was described as Charles Frederick, Duke of Brunswick, that being the title by which he continued to be known, though no longer reigning Duke, it was held good (*l*). So, where an assault was alleged to have been made on *Henry* Bennett, and him the said *William* Bennett to have been wounded, the indictment was held good in arrest of judgment (*m*). The misspelling of a surname, when its usual pronunciation is satisfied by the manner in which it is written in the record, as "Whyneard" for "Winyard," is sufficient after verdict (*n*). Where the indictment described the prosecutor as Darius and the evidence was that his name was Trius, it was held to be a question of fact for the jury, and not of law for the court, whether the two were *idem sonantia* (*o*). A mere statement of the christian name, without further description, where the surname of the party is known, will not suffice (*p*). Where the name and addition of the injured party cannot be ascertained, as where a body of a murdered person is found who cannot be identified, or goods are found on a highwayman, &c., the indictment may allege the party to be "to the jurors *unknown*" (*q*). To support the description of

(*f*) *R. v. Frost* (1855), 24 L. J. M. C. 116.

(*g*) 2 Hale, 182. As to stating dignities of parties prosecuted, see *ante*, p. 163.

(*h*) *R. v. Graham* (1791), 2 Lea. 549. An Irish peer, who was killed in an affray at Windsor, was thus described in an indictment for manslaughter: *Henry Sandford, Esquire, Baron Mount Sandford*, of C. in that part of the United Kingdom, &c., and it was held good: *R. v. Brinklett* (1828), 3 C. & P. 416.

(*i*) Dyer, 285.

(*k*) *R. v. Sulls* (1799), 2 Lea. 861.

(*l*) *R. v. Gregory* (1846), 15 L. J. M. C. 38.

(*m*) *R. v. Crespin* (1848), 17 L. J. M. C. 128.

(*n*) *R. v. Foster* (1820), R. & Ry. 412.

(*o*) *R. v. Davis* (1851), 20 L. J. M. C. 207.

(*p*) Hawk. b. 2, c. 25, s. 72.

(*q*) 2 Hale, 181.

“unknown” there must be evidence showing that the name could not reasonably have been supposed to be known to the grand jury (*r*). “Unknown” was held sufficient where there was evidence that the party injured, a bastard child who died at twelve days old unbaptized, had been called by its mother Mary Ann (*s*). The averment that the name was unknown implies the acquisition of a name, and is not, therefore, applicable to the case of a bastard child which has acquired no name either by reputation or baptism (*t*). A bastard which had never acquired a name is sufficiently identified by showing the name of its parent, thus—“A certain illegitimate male child then lately born of the body of A. B. (the mother)” (*u*). A bastard should not be described by his mother’s name till he has acquired it by reputation (*x*). A bastard child six weeks old, who was baptized on a Sunday, and down to the following Tuesday had been called by its name of baptism and mother’s surname, was held by Erskine, J., to be properly described by both those names in an indictment for its murder (*y*); but where a bastard was baptized “Eliza,” without mentioning any surname at the ceremony, and was afterwards, at three weeks old, suffocated by the prisoner, an indictment styling it “Eliza Waters,” that being the mother’s surname, was held bad by all the judges, as the deceased had not acquired the name of *Waters* by reputation (*z*). *Semb.* “Eliza” would have sufficed (*a*). In the previous case of *R. v. Frances Clark* (*b*), an indictment stated the murder of “George Lakeman Clark, a base-born infant male child, aged three weeks,” by the prisoner, its mother. The child had been christened *George Lakeman*, being the names of its reputed father, and was called so, and not by any other name known to the witnesses. Its mother called it so. There was no evidence that it had been called by or obtained its mother’s name of *Clark*. The court held him improperly laid *Clark*, and as nothing but the name identified him in it, the conviction was held bad (*c*). However, in *R. v. Biss* (*d*), an indictment against a married woman for murder of an illegitimate child, which stated “that she, in and upon a certain *infant male child, of tender years*, to wit, of the age of six weeks, and

Acquisition
of name by
reputation.

(*r*) *R. v. Stroud* (1842), 1 C. & K. 187.

(*s*) *R. v. Smith* (1833), 1 Moo. C. C. 402.

(*t*) *R. v. Willis* (1845), 1 Den. C. C. 80.

(*u*) *R. v. Mary & Jane Hogg* (1841), 2 M. & Rob. 380. See *R. v. Hicks* (1840), where an indictment for child murder was held bad for not stating the name of the child or accounting for its omission: 2 M. & Rob. 302.

(*x*) *R. v. Clark* (1818), R. & Ry. 358.

(*y*) *R. v. Evans* (1839), 8 C. & P. 765.

(*z*) *R. v. Waters* (1835), 1 Moo. 457.

(*a*) See *R. v. Stroud*, *sup.*

(*b*) *R. v. Clark*, *sup.*

(*c*) See *R. v. Sheen* (1827), 2 C. & P. 634.

(*d*) (1838), 8 C. & P. 773.

not baptized, feloniously and wilfully, &c. did make an assault, &c.," was held insufficient by all the judges, as it neither stated the child's name, nor that it was "to the jurors unknown." *Seemle*, it would have sufficed to state him as "a certain male child, &c. of tender age, that is to say, about the age of six weeks, and not baptized, born of the body of E. B." (*e*). Where a party is as usually known by one name as another, he may be described by either, and by the name which he has assumed, even though shown not to be his right name (*f*). Where a party injured has a mother or father of the same name, it is better to style the prosecutor the "younger," as it may be presumed that the parent is the party meant; for George Johnson means G. J. the elder, unless the contrary is expressed (*g*). But this was held immaterial where it sufficiently proved who Elizabeth Edwards, the party described assaulted, was, viz., the daughter of another Elizabeth Edwards (*h*). No indictment is any longer to be held insufficient because any person mentioned in the indictment is designated by a name of office or other descriptive appellation instead of his proper name (*i*); and variances may be amended (*k*).

Defective description cured.

Variances may be amended according to the proof.

Partners in trade.

Joint tenants.

It was formerly necessary, in cases of offences committed against the property of partners or joint owners, to state the names of all of them correctly; but now, by 7 Geo. 4, c. 64, s. 14, it is enacted, "that in any indictment or information for any felony or misdemeanour, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to, or be in the possession of more than one person, whether such persons be partners in trade (*l*), joint-tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another *or others*, as the case may be; and whenever in any indictment or information for any felony or misdemeanour it shall be necessary to mention for any purpose whatever any partners, joint-tenants, or parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid. And this provision shall be considered to extend to all joint-stock companies and trustees (*m*), that is to say, not being corporations with a corporate title, but even in such

Partners, &c.

Joint stock companies and trustees not

(*e*) See 2 C. & P. 635, n. See also *R. v. Sheen*, *sup.*

(*f*) *R. v. Norton* (1823), R. & Ry. 510; *R. v. Berriman* (1833), 5 C. & P. 601; *Anon.* (1834), 6 C. & P. 408.

(*g*) *Singleton v. Johnson* (1841), 9 M. & W. 67.

(*h*) *R. v. Peace* (1820), 3 B. & A. 579.

(*i*) 14 & 15 Vict. c. 100, s. 24.

(*k*) *Ibid.* s. 1.

(*l*) Legal partnership unnecessary: *R. v. Eleanor Gaby* (1810), R. & Ry. 178.

(*m*) *R. v. Pritchard* (1861), 30 L. J. M. C. 169.

a case under the Companies Acts, if no certificate of incorporation be produced the proper description is *and others* (*n*); but a partner and manager in an industrial society may have so much control given to him and be placed in so independent a position as to the property of the society, as to justify the laying the property of the society in him alone (*o*). By sect. 15 of the same Act, property of counties, ridings and divisions, whether real or personal, may be laid to belong to the inhabitants of the county generally, without naming them. By sect. 16, property provided for the use of the poor of a parish, township or hamlet, &c., to be used in the poor or workhouse, or by the master or workmen employed there, may be laid generally in the overseers of the poor for the time being, without naming them (*p*), and materials, tools or implements provided for the repair of roads not under the supervision of commissioners or trustees, as turn-pike, may be stated in like manner to be the property of the surveyor or surveyors of highways. By sect. 18, in indictments for offences relating to any matter within the cognizance of commissioners of sewers, the property may in like manner be described as in such commissioners, without naming them. The property of chattels, &c. used in the poor houses provided under the Poor Law Act, may be laid in the "guardians of the union" or "(of the parish of) in the county of , " they being a corporation by statute, as formed by the poor law commissioners (*q*). As the poor law commissioners, though not incorporated, had a seal of office, an indictment alleging that an order made by them was made by "the poor law commissioners for England and Wales," was held good after the verdict (*r*). But when an Act expressly provided that property might in an indictment be laid in "the trustees of the poor of , " it was held necessary to add their names, they not being incorporated (*s*). Property may be laid as the owner's though it has never been in his actual possession, but in that of his agent only (*t*). The property of a corporation must be laid to be their property in their corporate name (*u*); but in the absence of

being corporations.
County property.
Parish property.
Road repair, materials.
Guardians of a union.
Trustees of the poor.
Of corporations.

(*n*) *R. v. Frankland* (1863), 32 L. J. M. C. 69.

(*o*) *R. v. Webster* (1861), 31 L. J. M. C. 17; *R. v. Burgess* (1863), 32 L. J. M. C. 185.

(*p*) See *R. v. Went* (1818), R. & Ry. 359.

(*q*) 5 & 6 Will. 4, c. 69, s. 7; 5 & 6 Vict. c. 57, s. 16. District boards for management of district schools or asylums take real and personal property as a corporation: 7 & 8 Vict. c. 101, s. 45. As to the particular buildings which may be "workhouses" within 4 & 5 Will. 4, c. 76, and 5 & 6 Will. 4, c. 69, see *Cantrell v. Windsor Union (Guardians)* (1838), 4 Bing. N. C. 348, and 5 Vict. c. 18.

(*r*) *R. v. Crossley and another* (1839), 10 A. & E. 132.

(*s*) *R. v. Sherrington* (1789), 1 Lca. 513.

(*t*) *R. v. Remnant* (1807), R. & R. 136.

(*u*) *R. v. Brucall* (1824), 1 Moo. 15.

Friendly societies. the proper proof of incorporation, as under the Companies Acts the certificate of incorporation, they rank as ordinary partnerships (*x*). Property of friendly societies may be described as the property of the trustees in their proper names as trustees for the society or branch without further description (*y*); and of industrial and provident societies registered under 56 & 57 Vict. c. 39, in the society by its corporate name.

Public monies. Monies or valuable securities, embezzled by persons in the public service, may be described as the King's property (*z*).
Special property of bailee. Cattle or goods stolen from the possession of a bailee, *e.g.*, an innkeeper, warehouseman, carrier, laundress, tailor, pawnbroker, or agister, may be laid as the property of either owner or bailee, at the option of the prosecutor. Iron stolen from the bed of a canal while it was being cleansed was held rightly laid in the canal company, though they were not carriers, inasmuch as the canal company would restore goods found under such circumstances to the owner if he could be found, if not they would keep such articles themselves (*a*). So a box of a club, kept in a room in a public-house, was held to be rightly laid in the landlord (*b*). So the landlord of an inn has a special property in goods of his guest left behind in the inn unintentionally (*c*).

Property in bailee. A member of a co-operative society who has the sole management of a shop, and is answerable for all the property and monies coming to him in the course of such management, has such a property in the goods and monies as to justify the laying of the property in him as against another member of the society who is alleged to have stolen it (*d*). A bailee, parting with the possession of goods under a mistake to a person not entitled to receive them, does not cease to be bailee, and retains a sufficient property to lay them as his property in an indictment (*e*). The possession of a servant being that of his master, if derived from him, he has no special property in them as a bailee has, so that the property in stolen goods cannot be laid in him (*f*), or in a married woman, though living apart from her husband, unless such goods, money, &c. are her separate property under the Married Women's Property Act, 1870 or 1882, or otherwise, or unless she has been judicially separated from her husband,

(*x*) *R. v. Frankland* (1863), 32 L. J. M. C. 69.

(*y*) 59 & 60 Vict. c. 25, s. 51.

(*z*) 24 & 25 Vict. c. 96, ss. 69, 70.

(*a*) *R. v. Rowe* (1859), 28 L. J. M. C. 128.

(*b*) *R. v. Wymer* (1830), 4 C. & P. 391.

(*c*) See *R. v. Rowe*, *sup.*

(*d*) *R. v. Webster* (1861), 31 L. J. M. C. 17; *R. v. Burgess* (1863), 32 L. J. M. C. 185, *ante*, p. 171.

(*e*) *R. v. Vincent* (1852), 21 L. J. M. C. 109.

(*f*) *R. v. Hutchinson* (1820), R. & R. 412; *R. v. Wilkins* (1789), 1 Lea. 525.

or has obtained a protection order (*h*). Goods let with a lodging and stolen from it must be laid to be the lodger's, except he have stolen them himself; in which case the property is to be laid in the owner or person letting to hire (*i*). Goods seized under a *fi. fa.* may, if stolen before sale, be described as the original owner's (*k*). Goods stolen by A., and then stolen from him, may be laid either as his in respect of the possession, or as the true owner's (*l*). A child's clothes or necessaries should, it seems, be alleged to be the property of the child, though it is of tender age; but it seems that they may be alleged to belong to the parent (*m*). Shrouds and coffins, when stolen from graves, are in general to be laid as the property of the personal representatives, if known. They may be laid as the property of a person unknown, where such is the fact (*n*); or if there be no will or administration, of the ordinary (*o*); and now by 21 & 22 Vict. c. 95, s. 19, between death of intestate and grant of letters of administration, the judge of the Court of Probate takes the place of the ordinary, or they may be laid to be the property of the persons who caused the deceased to be buried, and if the parish has not been at the expense of burial, then of the person who paid the expenses, but not of the parish officers. If before administration is taken out to an intestate his property is stolen, it should be laid as being vested in the judge of the Court of Probate (*oo*), though administration is granted before the indictment (*p*). Property stolen from a *feme sole* may be laid as hers by her maiden name, though she marries before indictment found (*q*).

In case of
intestacy.

6. The charge must specify some particular and definite act (*r*); except where a person is indicted as a "common barrator," or a "common scold," or as "keeping a common brothel or gambling house;" in which cases the offence embraces a succession of acts, by which it is not only proved, but in which it consists. But, though in the case of an indictment against a party, as a common barrator, brothel, or

Mode of
charging
offence.

(*h*) 33 & 34 Vict. c. 93, s. 11; 45 & 46 Vict. c. 75, s. 12. As to the effect of a judicial separation, see 20 & 21 Vict. c. 85, ss. 25, 26; 21 & 22 Vict. c. 108, ss. 7, 8. As to a protection order, see 20 & 21 Vict. c. 85, s. 21; 21 & 22 Vict. c. 108, s. 8. And see as to separation orders made by courts of summary jurisdiction, 41 Vict. c. 19, s. 4; 49 & 50 Vict. c. 52, now both repealed and replaced by 58 & 59 Vict. c. 39.

(*i*) 24 & 25 Vict. c. 96, s. 74.

(*k*) *R. v. Eastall* (1822), 2 Russ. on Cr. 5th ed. 250.

(*l*) 2 East, P. C. 654; *R. v. Wilkins* (1789), 1 Lea. at p. 522.

(*m*) *Ibid.*

(*n*) See *ante*, p. 168; Archb. Crim. Pl. 17th ed. 40; 2 East, P. C. 652.

(*o*) *R. v. Johnson* (1857), 27 L. J. M. C. 52.

(*oo*) Now the President of the Probate, Divorce and Admiralty Division of the High Court of Justice.

(*p*) *R. v. Smith* (1835), 7 C. & P. 147; *R. v. Green and Woodley* (1837), per Parke, B., Berks Lent Ass. 1837; Dick. Q. S. 194, 5th ed.

(*q*) *R. v. Turner* (1790), 1 Lea. 536.

(*r*) *R. v. Rowed* (1842), 3 Q. B. 180. See *R. v. Robe* (1734), Stra. 999, which was an indictment for extortion.

Particulars of the charge.

Particularity required.

gaming-house keeper, this general charge will suffice on the record, the courts have always compelled the prosecutor to give notice to the defendant before the trial of the particular facts on which he intends to rely in support of the accusation (*s*).

7. The crime must be positively and explicitly stated on the record, in such a manner as to give the party indicted notice by distinct averment what the charge is which he must be prepared to defend (*t*); thus an indictment on 24 & 25 Vict. c. 96, s. 58, for being found by night armed with a dangerous weapon with intent to break into any building and to commit any felony therein, must specify the building intended and it seems the felony (*u*); but it is not necessary that all the facts by which a charge will be evidenced, *e.g.*, on a charge of inciting to commit an offence, the particulars of the incitement or solicitation need not be shown (*x*), though the offence must either be charged in certain technical language known to the law, or sufficient must be stated to show, on the record itself, that an indictable offence has been committed. Thus, as only certain false pretences, such as those of existing facts, are within the statute, making the obtaining of goods or money by such pretences indictable, the indictment should show on its face what the false pretences were, in order that the court may judge whether they are sufficient or not (*y*), and, in general, where the means of effecting the object form the essence of the charge, it is necessary to set them forth, but not otherwise (*z*). Thus, it is never necessary to specify the means by which a theft or

(*s*) 2 Hawk. c. 25, s. 59; *R. v. Curwood* (1835), 3 A. & E. 815. So, where the counts of an indictment for a conspiracy are framed in a general form, particulars will be ordered, and must give the defendants the same information as a special count would have done, but need not state the specific acts which the defendants are charged with, or the times and places at which they are alleged to have occurred: *R. v. Hamilton* (1836), 7 C. & P. 448. The same course was taken by discretion of the court on indictments for misdemeanours, where more than one act of embezzlement was laid according to 7 & 8 Geo. 4, c. 29, s. 48 (rep.), and the persons from whom the money was received are named: *R. v. Hodgson* (1828), 3 C. & P. 422; *R. v. Bootyman* (1832), 5 C. & P. 300. The course for the prisoner to take is to apply to the judge on an affidavit stating that he does not know what the charges are, and that he has applied to the prosecutor for a particular and that it has been refused.

(*t*) *R. v. Jarrold* (1863), 32 L. J. M. C. 258. See *R. v. Perrott* (1814), 2 M. & S. 378.

(*u*) *Ibid.*

(*x*) *R. v. Higgins* (1801), 2 East, 5; *R. v. Perrott, ubi sup.*

(*y*) *R. v. Mason* (1788), 2 T. R. 581; *R. v. Perrott, ubi sup.*; but this defect will be cured by verdict. If the prisoner desires to take advantage of the point, he should move to quash or demur: *R. v. Goldsmith* (1873), L. R. 2 C. C. R. 74; *Heyman v. R.* (1873), L. R. 8 Q. B. 102.

(*z*) *R. v. Lloyd* (1767), 2 East, P. C. 1122; *R. v. Nott* (1843), 12 L. J. M. C. 143. See *R. v. Sparling* (1721), 1 Stra. 497 (case of a conviction held bad for not sufficiently defining the offence).

burglarious entry was effected. It has been holden, that in an indictment for soliciting another to commit a crime, it is not necessary to particularize any of the solicitations adopted (*a*). So, on an indictment for a conspiracy at common law to effect objects prohibited by statute, the object being set out, the means by which it was to be effected need not be stated (*b*).

And where a statute made it a felony to assist a prisoner to escape "by any means whatever," the indictment is sufficient, though it does not state the means which were used (*c*): where it was said by Lord Campbell (*d*), that that was not like an indictment for obtaining goods by false pretences, in which the false pretences must be set out, in order that the court may see whether they are within the statute.

On the one hand, nothing necessary will be supplied by intendment; on the other, no matter of defence need be anticipated by a negative. The charge must always be positive, and never introduced with a "that *whereas*," or by way of recital (*e*). The charge must never be in the disjunctive, as "published *or* caused to be published," so as to leave it uncertain on the record which branch of the alternative the prosecutor intends to charge (*f*); though if it be expressed in the copulative, as "published *and* caused to be published," it will suffice to prove either (*g*). So if the character in which the party is indicted is left uncertain, as if he is charged as a servant *or* deputy, or is indicted in a manner which will apply to either of two definite offences without specifying which, the indictment is bad for uncertainty (*h*). If a statute uses words in the alternative, so as to distinguish between them, *e.g.*, "stab *or* cut," the distinction must be attended to in the indictment, and the offence is improperly laid as "stabbing *and* cutting" (*i*). An indictment upon 11 Geo. 4 & 1 Will. 4, c. 66, s. 20, the words of which are "destroy, deface, *or* injure," for destroying, defacing *and* injuring a register of baptism, is not uncertain or double (*k*); but if two acts are laid, each excluding the notion of the other, and there is no statement as to which

Defence need not be negatived.

Charge should be direct.

Charge must not be uncertain or double.

(*a*) *R. v. Fuller* (1797), 1 B. & P. 180; *R. v. Nield* (1805), 6 East, 417, 424. And see *R. v. Higgins* (1801), 2 East, 5.

(*b*) *R. v. Rowlands* (1851), 21 L. J. M. C. 81.

(*c*) *R. v. Holloway* (1851), 2 Den. C. C. 287.

(*d*) *Ibid.* 296.

(*e*) Hawk. b. 2, c. 25, s. 60.

(*f*) Footnote to *R. v. Inhabs. of Hamworth* (1730), 2 Stra. 900. See Archb. Cr. Pl. 22nd ed. p. 75.

(*g*) See *R. v. Middlehurst* (1757), 1 Burr. 400. "Causing to be done," generally speaking, proves "doing:" 2 Hawk. P. C. ch. 25, 62. For an averment of intent to do one or another unlawful act is divisible: *R. v. Dawson* (1821), 3 Stark. 62.

(*h*) *Ibid.* See Archb. Crim. Pl. 22nd ed. pp. 61, 75.

(*i*) *R. v. M'Dermot* (1818), R. & R. 356; and see *R. v. Duffin* (1818), *ibid.* 365; *R. v. Williams* (1825), 1 Moo. Cr. C. 108.

(*k*) *R. v. Bowen* (1844), 1 Den. C. C. 22.

is the specific charge, as in *R. v. Stocker* (*l*), there is, in fact, no charge at all, and the indictment is bad (*m*), and may be quashed before plea on that ground.

Formal defects. But the defect in an indictment that the charge is laid in the alternative is a formal defect only (*n*), and can only be taken advantage of by demurrer or motion to quash before the jury are sworn (*o*).

Repugnancy. Repugnancy in any material point will also vitiate on demurrer or motion to quash; but the objection must be taken before the jury are sworn (*p*), unless the indictment is so insensible that no intendment can possibly be made by the court so as to support it after verdict; but stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened, is not to make the indictment insufficient (*q*); and a merely superfluous averment, which can be rejected without affecting the description of the offence, may be rejected as surplusage, being the mere introduction of an additional circumstance not necessary to constitute the offence (*r*). Thus where the indictment alleged that the defendant on *Henry B.* did make an assault, and him the said *William B.* did beat, &c., the words "the said William B." were rejected as surplusage after verdict (*s*); and where a florin was described as current silver coin of the goods and chattels of S. F., inasmuch as money does not fall within the description "goods and chattels," these words were rejected as surplusage, and the averment "current silver coin of S. F." held to be a sufficient description of the property. For it is not necessary to prove the offence laid in the indictment to the whole extent as laid, provided the proof constitute an offence of the same quality as that charged; but an indictment for felony will not support a conviction for a misdemeanour (*t*), except as provided by statute; and it is the same whether the offence is by statute or at common law (*u*). The indictment will not be vitiated by mere clerical or grammatical errors, unless they alter the sense, or render it so wholly uncertain that the real meaning cannot be gathered (*x*).

Surplusage.

Clerical errors.

Terms of art. There are certain terms of art which the law has applied to the legal description of certain offences; and these must

(*l*) (1695), 5 Mod. 138.

(*m*) See *R. v. Bowen*, *ubi sup.*

(*n*) *R. v. Middlehurst* (1757), 1 Burr. 400.

(*o*) 14 & 15 Vict. c. 100, s. 25.

(*p*) *Ibid.*

(*q*) *Ibid.* s. 24; *ante*, p. 156.

(*r*) *R. v. Crespin* (1848), 17 L. J. M. C. 128; *R. v. Jones* (1831), 2 B. & Ad. 611, 616.

(*s*) *R. v. Crespin*, *sup.*

(*t*) *R. v. Westbeer* (1739), Stra. 1137, or *vice versâ*. But see *ante*, p. 152.

(*u*) *R. v. Jones* (1831), 2 B. & Ad. 611, 614.

(*x*) *R. v. Stokes* (1848), 17 L. J. M. C. 116.

always be inserted (*y*). Thus, no statement of facts, however clearly amounting to a felony, will supply the place of the word *feloniously* (*z*); no allegation of a breaking a dwelling-house in the night with intent to steal will charge a burglary, if the word *burglariously* be omitted (*a*); no charge of murder can be properly expressed without the words "*malice aforethought*" and "*murder*" (*b*). In indictments for rioting it is believed that the word *riotously* is essential (*c*), and it has been twice ruled by single judges that such an indictment must conclude *to the terror*, &c. (*d*). The word *maintain* is believed to be essential to indictments for maintenance. The words *with a strong hand* are proper to be used in indictments for forcible entry, but would not appear to be essential if it otherwise sufficiently appears on the face of the indictment that force and violence of a kind sufficient to bring the facts within the statutes were in fact used (*e*). But a conclusion, such as "and so the defendant did commit wilful and corrupt perjury," may be rejected as surplusage (*f*); and an indictment showing on the facts stated a misdemeanour at common law not being perjury, strictly speaking, will be supported after verdict, though it contain those words (*g*).

Written instruments, as libels, threatening letters, warrants, orders of justices, &c., which form part of the gist of the offence charged, need no longer be set out verbatim, in words and figures. But in indictments for larceny, or embezzlement, or destroying or concealing, or obtaining by false pretences any instrument made the subject of larceny by statute, or in any case where it shall be necessary to make any averment in any indictment as to any instrument, whether the same consists wholly or in part of writing, print or figures, it is sufficient to describe such instrument by any name or designation by which it is usually known, or by the purport thereof, without setting out any copy or fac-simile of the whole or any part thereof (*h*), or otherwise describing the same or the value thereof. The same relaxation of the rule is now permitted in indictments for forgery, or utter-

Written
instruments.

(*y*) 2 Hawk. P. C. bk. 2, c. 25, s. 55.

(*z*) 2 Hale, 171, 184; *R. v. Gray* (1864), 33 L. J. M. C. 78.

(*a*) 2 Hale, 171, 184; *Holford v. Bailey* (1849), 13 Q. B. 446.

(*b*) Foster, C. L. 304.

(*c*) See *R. v. Johnson* (1752), 1 Wils. 325, which, however, is not decisive.

(*d*) *R. v. Hughes* (1830), Park, J., 4 C. & P. 373; *R. v. Cox* (1831), Patteson, J., 4 C. & P. 538. The usual allegation is "to the great disturbance and terror of the liege subjects of our Lord the King then and there being."

(*e*) See *R. v. Wilson* (1799), 8 T. R. 357; *R. v. Storr* (1765), 3 Burr. 1699; *R. v. Blake* (1765), 3 Burr. 1731.

(*f*) *R. v. Hodgkiss* (1869), L. R. 1 C. C. R. 212; *Ryalls v. The Queen* (1849), 18 L. J. M. C. 69.

(*g*) *R. v. Hodgkiss* (1869), *sup*.

(*h*) 2 East, P. C. 602, 777; 14 & 15 Vict. c. 100, ss. 5, 7.

Bank notes.

ing an instrument, or writing, no copy or fac-simile of which need now be set forth; and the instrument may be described as in an indictment for stealing it (*i*). So as to bank notes, it is provided that where it shall be necessary to make any averment as to any money or bank note of the Bank of England or any other bank, it shall be sufficient to describe such money or bank note simply as money, without specifying any particular coin or bank note (*j*). The words "according to the tenor following," or "in the words and figures following," will make it necessary that the instrument should follow, correctly set out, though it might not have been necessary to have so set it out; and the prisoner, if in felony, will be acquitted for any variance, unless the record be amended at the trial, under the power conferred on it by the 12 & 13 Vict. c. 45, s. 10, and 11 & 12 Vict. c. 46, s. 4 (*k*); but mere literal variances, not altering or changing a word into another word, are not material; whereas if it be only intended to set out the substance, it may be introduced by the words "in substance as follows," or "to the effect following," or "in manner and form following;" and if the instrument produced in evidence be in substance the same with that set out, it will suffice (*l*); the use of these latter words, where a literal copy is requisite, will entitle the defendant to demur or move to quash before the jury are sworn (*m*). No indictment is now insufficient for the omission of the words "as appears by the record" (*n*). The words "*with force and arms*" were formerly inserted in all indictments for offences committed with violence; but now the want of such averment is not to make an indictment insufficient by 14 & 15 Vict. c. 100, s. 24, *ante*, p. 156. The common expressions, "*not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil;*" "*being an evil-disposed person,*" &c., being merely superfluous, should be omitted.

Statutory offences.

Where an offence is created by statute, or where the punishment of either a common law or statutory offence is increased by statute, it is necessary to charge the defendant with having committed or omitted the act under the circumstances and with the intent mentioned in the statute, so as to bring it within the exact meaning of the enactment; and it is rarely safe to depart from its exact language (*o*); and the

(*i*) 24 & 25 Vict. c. 98, s. 42.

(*j*) 14 & 15 Vict. c. 100, s. 18.

(*k*) See *post*, p. 254.

(*l*) *Curton v. R.* (1861), 30 L. J. M. C. 149.

(*m*) *Wright v. Clement* (1820), 3 B. & A. 503; 14 & 15 Vict. c. 100, s. 25.

(*n*) 14 & 15 Vict. c. 100, s. 24, *ante*, p. 156.

(*o*) 2 Hale, 170. However, see *ante*, p. 159. The conclusion *contra formam statuti* will not cure such a defect: 2 Hale, 170.

employment of any words of the Act applicable to the offence, such as "feloniously" (*p*) or "knowingly," where the statute requires guilty knowledge as part of the offence, cannot be dispensed with, and the words "unlawfully and fraudulently" will not supply the place (*q*); but if the words of the statute are followed in describing the offence, it will be held after verdict sufficient to warrant the punishment imposed by the statute. If a statute makes it criminal to do an act "*unlawfully and maliciously*" (*e.g.*, 7 & 8 Geo. 4, c. 30, s. 2, burning houses), it must be so laid; and stating that it was done "feloniously, voluntarily, and maliciously" is not enough (*r*). So where an Act in creating an offence used the word "unlawfully," as well as "feloniously, wilfully, and maliciously," an indictment which charged the act as done only "feloniously, wilfully, and maliciously" was held bad in arrest of judgment (*s*). "*Unlawfully and maliciously*" in an indictment are not equivalent to "*wilfully and maliciously*" in a statute (*t*).

If the statute on which the indictment is framed contains exceptions embodied in the enacting clause, it will be necessary to negative them, in order to bring the case within the main provision (*u*). But where the exceptions are contained in a *distinct* clause or proviso of the same Act, or in a subsequent statute, or if, though in the same section with the enacting clause, they are not incorporated with it by necessary connection, or by words of reference subjoined, it is not necessary to notice them in the charge, by way of qualifying the offence, for it lies on the party accused to bring his case within them by way of defence, on not guilty (*x*). And recently it has been held that, where a statute by which an offence is created contains a proviso which affords a defence to proceedings taken in respect of the offence, it is not necessary for the prosecution to negative the proviso in the indictment, unless the proviso is in the nature of an exception so incorporated, directly or by reference, with the enacting clause, that the enacting clause cannot be read without the qualification introduced by the proviso (*y*). And by 7 Geo. 4, c. 64, s. 21, where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the

Of negating exceptions.

(*p*) *R. v. Gray* (1864), 33 L. J. M. C. 78.

(*q*) *R. v. Jukes* (1800), 8 T. R. 536.

(*r*) *R. v. Turner* (1829), 1 Moo. C. C. 239.

(*s*) *R. v. Ryan* (1837), 2 Moo. C. C. 15.

(*t*) *R. v. Davis* (1788), 1 Leach, C. C. 493. See *R. v. Schofield*, *post*.

(*u*) 2 Hale, 170. See *Spieres v. Parker* (1786), 1 T. R. 144; *Dwarris on Statutes*, 515.

(*x*) 2 Hale, 171. See *Gill v. Scrivens* (1796), 7 T. R. 27; *Morell v. Harvey* (1836), 4 A. & E. 684; *R. v. Hall* (1786), 1 T. R. 320; *Steel v. Smith* (1817), 1 B. & A. 94. See, also, *Mosley v. Walker* (1827), 7 B. & C. at p. 57.

(*y*) *R. v. James* (1902), 20 Cox, C. C. 157.

indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute.

Public Acts.

In any indictment on a *public* Act, whether general or local, it is unadvisable to recite the Act, because the judges are bound to take notice of all public Acts. It is sufficient to conclude "against the form of the statute in such (or that) case made and provided," as the court takes judicial notice of it (*z*); but if the Act be cited, and the title is inaccurately stated, nevertheless if it is stated with sufficient clearness to enable the judge, without any doubt, to know the Act referred to, such inaccuracy is no ground of objection (*a*).

Private Acts.

A *private* Act, viz., one not public in its nature or having a public clause, must be set out in pleading (*b*); but the court will intend it to be correctly set out till the contrary is shown, which may be done by the production of a copy of the Act purporting to be printed by the King's printer (*c*); but now all Acts made since 1850 are to be deemed public Acts, and be judicially noticed unless the contrary be declared (*d*).

Names and descriptions of things.

In mentioning articles which are the subject of charge, they should be described specifically by the names by which they are commonly known; and their number, quantity and value used to be set forth, though they need not have been proved as laid, except where the value, &c. were of the essence of the offence; but an indictment for attempting to steal goods in a house cannot specify the goods, because they cannot be known (*e*). Money does not fall within the definition of "goods and chattels" (*f*). The proof as to the description of articles should correspond with the description; but a variance between the description and proof may be amended at the trial under 14 & 15 Vict. c. 100, s. 1. Any matter unnecessary to be proved need no longer be alleged, and the want of any averment of the value or price, except where the value or price is of the essence of the offence, is now cured by 14 & 15 Vict. c. 100, s. 24.

Variance amendable.

If a statute makes a *distinction* between things belonging to the same class, or commonly comprehended within one general term, it was formerly held to be essential to indicate the particular thing, and the general term not to be sufficient (*g*): thus where a statute (*e.g.*, 15 Geo. 2, c. 34) specified

(*z*) 2 Hale, 172.

(*a*) *R. v. Westley* (1859), Bell, C. C. 193.

(*b*) 2 Hale, 172.

(*c*) 8 & 9 Vict. c. 113, s. 3.

(*d*) 52 & 53 Vict. c. 63, s. 9.

(*e*) *R. v. Johnson* (1864), 34 L. J. M. C. 24.

(*f*) *R. v. Guy* (1782), 1 Lea. 241; *R. v. Morris* (1787), 1 Lea. 468; *R. v. Radley* (1849), 18 L. J. M. C. 184.

(*g*) *R. v. M'Dermot* (1818), R. & Ry. 356; *R. v. Duffin* (1818), *ibid.* 365.

"lambs" as well as "sheep," and the indictment was for stealing sheep, evidence of stealing lambs was held not to support it (*h*). But since that case, where an indictment was for stealing sheep under 7 & 8 Geo. 4, c. 29, s. 25, and the jury found the animal to be a lamb, it was held good, though the act specified lamb as well as sheep (*i*); and an indictment for stealing a *sheep* was supported after verdict, the prisoner having stolen a *ewe*, and the words of the statute being "ram, ewe, sheep, or lamb" (*k*); but any variance in the description of any matter or thing mentioned in any indictment may be amended at the trial (*l*).

What the law forbids to be done, it becomes illegal to do wilfully; on which account the doing it will be the subject-matter of an indictment as a contempt of the statute (*m*), without the addition of any corrupt motives (*n*), for disobedience of an Act of Parliament is indictable on the principles of the common law (*o*). But the intention of the party at the time he commits an act charged as an offence is often as necessary to be proved as any other fact laid, though it can only be proved by overt acts, every man being supposed to intend the necessary consequence of his own acts (*p*). When more than one criminal intent is averred, the averment is divisible, and only one need be proved; *e.g.*, if a person is charged with assaulting a child with intent to abuse *and* carnally know her, he may be convicted of an assault with an intent to abuse her only (*q*).

Laying the intent.

Intent partible.

(*h*) *R. v. Loom and others* (1827), 1 Moo. C. C. 160; *R. v. Cook* (1774), 2 East's P. C. 616.

(*i*) *R. v. Spicer* (1845), 1 Den. C. C. 82; *R. v. M'Culley* (1838), 2 Moo. C. C. 34.

(*k*) *R. v. M'Culley, sup.* Mr. Dennison adds the following note (1 Den. C. C. 83) to his report of *Spicer's case*:—"It is believed that the principle of the decision in the text is that an indictment describing a thing by its generic term is supported by proof of a species, *which is clearly comprehended within such description*; notwithstanding that the statute under which the indictment is framed mentions both the genus and the species. *R. v. Loom* and *R. v. Puddifoot* must therefore be considered to be overruled."

(*l*) 14 & 15 Vict. c. 100, s. 1.

(*m*) *Crouther's case* (1599), Cro. El. 654.

(*n*) *Per Ashurst, J., R. v. Sainsbury* (1791), 4 T. R. 457.

(*o*) *R. v. Jones* (1740), 2 Stra. 1146, indictment for not taking on defendant the office of overseer on a regular appointment.

(*p*) *R. v. Farrington* (1811), R. & R. 207.

(*q*) *R. v. Dawson* (1821), 3 Stark. 62; *R. v. Jones* (1831), 2 B. & Ad. 611, 616; *Figgins v. Cogswell* (1815), 3 M. & S. 369. As to intent in uttering a counterfeit half-crown in charity, see *Page's case* (1837) (on 2 Will. 4, c. 34, s. 7), 8 C. & P. 122; and *Allday's case* (1837) for erasing and altering a stamped post-horse licence, both before Lord Abinger, C.B., 8 C. & P. 136.

In *R. v. Hunt and another* (1811), 2 Camp. 583, an information charged that defendant "composed, printed, and published" a libel. The proof was of publication only—Lord Ellenborough held it sufficient for a con-

Charging
previous
conviction.

Under the
Larceny Act,
1861.

Under the
Prevention of
Crimes Act,
1871.

In any indictment for any offence punishable under 24 & 25 Vict. c. 96, and committed after a previous conviction or convictions for any felony, misdemeanour, or offence or offences punishable upon summary conviction, it shall be sufficient after charging the subsequent offence to state that the offender was at a certain time and place convicted of felony, or of an indictable misdemeanour, or of an offence or offences punishable upon summary conviction (as the case may be), without otherwise describing the previous felony, misdemeanour, offence or offences, and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanour, or a copy of such summary conviction, purporting to be signed by the clerk of the court or other officer, having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate or copy a fee of five shillings, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction without proof of the signature or official character of the person appearing to have signed the same (*r*).

The rules contained in the above 116th section, in relation to the form of and the proceedings upon an indictment for any offence punishable under that Act, committed after previous conviction, shall, with the necessary variations, apply to any indictment for committing a crime as defined by the Prevention of Crimes Act, 1871, after previous conviction for a crime, whether the crime charged in such indictment, or the crime to which such previous conviction relates, be or be not punishable under the 24 & 25 Vict. c. 96 (*s*).

The expression "crime" in that Act (sect. 20) means in England any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanour under 24 & 25 Vict. c. 96, s. 58.

viction, adding, "If an indictment charges that the defendant 'did and caused to be done' a particular act, it is enough to prove either. The distinction runs through the whole criminal law; and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified."—Defendants convicted.

In *R. v. Williams* (1811), 2 Camp. 646, defendant was charged with "composing, printing, and publishing" a libel. His MSS. were produced and shown to have been delivered by him to a printer, who printed and sold copies by his orders. These copies differed from the indictment and from the MSS., which was adhered to in it. Lawrence, J., "Defendant may be acquitted of 'printing,' and found guilty of 'composing and publishing.'"—Defendant convicted.

(*r*) 24 & 25 Vict. c. 96, s. 116.

(*s*) 34 & 35 Vict. c. 112, s. 9.

And under the Coinage Act (24 & 25 Vict. c. 99), s. 37, Under
 where any person shall have been convicted of any offence Coinage Act.
 against this Act or any former Act relating to the coin, and
 shall afterwards be indicted for any offence against this Act
 committed subsequent to such conviction, it shall be sufficient
 to state the substance and effect only (omitting the formal
 part) of the indictment and conviction for the previous offence;
 and a certificate containing the substance and effect only (omit-
 ting the formal part) of the indictment and conviction for the
 previous offence, purporting to be signed by the clerk of the
 court or other officer, having or purporting to have the custody
 of the records of the court where the offender was first con-
 victed, or by the deputy of such clerk or officer, shall, upon
 proof of the identity of the person of the offender, be sufficient
 evidence of the previous conviction without proof of the signa-
 ture or official character or authority of the person appearing
 to have signed the same, or of his custody or right to the
 custody of the records of the court, and for every such certifi-
 cate a fee of six shillings and eight pence, and no more, shall
 be demanded or taken.

In any case where by statute a prisoner is made liable to a
 more severe sentence after a previous conviction, in order to
 sustain such heavier sentence the indictment must allege the
 previous conviction, and a plea of confession or the verdict of
 the jury must be taken on the question of identity (*t*). Though
 it is more usual to aver the previous conviction after the
 allegation of the particular offence, it does not affect the
 validity of the indictment if such an averment be made at the
 beginning (*u*).

8. The ordinary conclusion of an indictment at common law Conclusion at
 is "*against the peace of our said Lord the King, his crown and common law.*"
dignity." These words should be used (*x*) except in an indict-
 ment for a mere nonfeasance at common law, when it is said
 their omission would not prejudice (*y*), and they should equally
 be employed in an offence against a statute.

An indictment for an offence against public decency need
 not conclude *ad commune nocumentum* since 14 & 15 Vict.
 c. 100, s. 24 (*z*); at any rate, the objection must be taken
 before the jury are sworn.

Formerly, even when the conclusion was an important part
 of the indictment, to conclude an indictment for a common law

(*t*) *R. v. Willis* (1872), 41 L. J. M. C. 102; *R. v. Summers* (1869), L. R. 1 C. C. R. 182.

(*u*) *R. v. Hilton* (1858), 28 L. J. M. C. 28.

(*x*) Whether in misdemeanour, *R. v. Taylor* (1824), 5 D. & R. 422, common law felony, or felony created by statute: *R. v. Cook* (1810), R. & Ry. 176.

(*y*) Fortescue, 131.

(*z*) *R. v. Holmes* (1853), 22 L. J. M. C. 122.

offence as *contra formam statuti*, though improper, was not fatal, and those words might be rejected as surplusage (*a*). And now neither the omission of the words *against the peace*, nor the want of a proper or formal conclusion, renders the indictment insufficient, since 14 & 15 Vict. c. 100, s. 24, *ante*, p. 156.

Conclusion on statutes.

Where an offence is created by statute, the words *contrary to the form of the statute in such case made and provided* should be inserted either before or after the words "against the peace," &c. Where the matter charged was no offence at common law, the omission of these words did so entirely vitiate that no judgment could have been given on it (*b*); but now, by 14 & 15 Vict. c. 100, s. 24, no indictment for any offence shall be held insufficient for the *omission* of the words "against the peace," nor for the *insertion* of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versâ*.

Before the statute, questions had arisen in cases where there were more than one statute referring to the offence, the proper conclusion should be "contrary to the form of the statute or statutes;" but these questions have now become immaterial since the statute.

But where the matter charged was an offence at common law, and was heightened in degree by a statute, or some new punishment was superadded by statute, the indictment need not have concluded *contra formam statuti*, but would have stood as a mere indictment for the common law offence, and judgment for the statutory punishment passed (*c*).

Obstructing the execution of powers granted by statute is an offence at common law, and ought not to conclude *contra formam statuti* (*d*).

Besides these necessary parts of the conclusion, it was formerly usual to introduce others of mere moral inference, as "to the great displeasure of Almighty God"; "to the evil example of all others"; and "to the great damage" of the party directly aggrieved; but these were all clearly unnecessary before the 14 & 15 Vict. c. 100, s. 24, which now enacts, that no indictment shall be insufficient for want of a proper or formal conclusion.

(*a*) *R. v. Mathews* (1793), 5 T. R. 162; *Williams v. The Queen* (1845), 7 Q. B. 253.

(*b*) 1 Hale, 172, 189, 192. For every offence for which a party is indicted is supposed to be prosecuted as an offence at common law, unless the prosecutor, by reference to a statute, shows that he means to proceed on it; and without such express reference, if it be no offence at common law, the court will not look to see if it be an offence by statute: *per* Lawrence, J., in *Lee v. Clark* (1802), 2 East, 340; Doct. Plac. 332; 2 Hawk. c. 25, s. 116; *R. v. Deacon* (1824), Ry. & M. 27.

(*c*) *Williams v. The Queen* (1845), 7 Q. B. 250, overruling the dictum of Lord Hale (2 Hale, 191) to the contrary.

(*d*) *R. v. Smith* (1780), 2 Doug. 441.

The bill of indictment being prepared must be engrossed ; that is, fairly written on parchment, without a stamp. Formerly, all indictments were in Latin ; but, by 4 Geo. 2, c. 26 (*e*), they must be in English, and written in a legible hand, under the penalty of 50*l*. The indictment should be written in words at length, without abbreviations or figures (*f*).

If the bill be not found, or if the indictment is defective and quashed (as to which see *post*, Chap. V. Sect. 5, p. 202), a new and more regular one may be framed and sent to a subsequent grand jury for their finding (*g*). So that the mere insufficiency of the finding affords no future indemnity to the party indicted (*h*) ; but if a bill be ignored by a grand jury, it is not proper to send up a second bill for the same offence against the same person before the same jury, whose labours, if this were permitted, might be protracted very unreasonably, so that parties having bills to prefer should wait till all their witnesses are arrived and the evidence complete before sending in the bill (*i*).

Fresh indictment.

SECTION 4.

OF PROSECUTION BY PRESENTMENT.

Presentments may be by the oath of any twelve of the grand jury at common law, for offences within their own knowledge (*k*), with the exception hereafter mentioned as to

By grand jury.

(*e*) Repealed 42 & 43 Vict. c. 59 ; but the repeal is not to affect any principle or rule of law established by or under any enactment repealed.

(*f*) See 2 Hale, 170 ; Archb. Crim. Pl. & Ev. 22nd ed. p. 73.

(*g*) 1 Chitt. Cr. L. 325, 1st ed. ; Bac. Abr. tit. *Indictment* (D. 2) ; see *ante*, p. 133.

(*h*) 1 Ch. Cr. L. 325, 1st ed.

(*i*) *R. v. Humphreys* (1842). Car. & M. 601 ; *R. v. Austin* (1850), 4 Cox, C. C. 385.

(*k*) 2 Hale, 161 ; Lambard, l. 4, c. 5. The form of a presentment by a grand jury resembles an indictment (see, however, for an exception, *R. v. Middlesex* (1738), Andrews, 285, presentment that bridge out of repair), except in its commencement, which is here subjoined :

Monmouthshire, to wit. Be it remembered, that at a general quarter session of the peace of our Lord the King, holden at for the said county, on the day of A.D., &c. before A. B. and C. D., Esqrs., and the Rev. P. Q., clerk, and others, their companions, justices of our said Lord the King, assigned, &c. It is presented by the oath [*as to adding "or affirmation," ante*, p. 39] of M. N., O. P., Q. R., &c. (*stating the names of the grand jurors*), good and lawful men of the said county, then and there sworn and charged to inquire for our said Lord the King, and the body of the said county, as followeth, that is to say : Monmouthshire aforesaid ; the jurors, &c., *as in an indictment*.

highways and turnpike roads. If the offence is one of which they can thus take legal cognizance, no bill is sent before them (*l*). They deliver their presentment into court to the clerk of the peace, who puts it into the form of an indictment, on which process may issue, as in the ordinary case of an indictment found; but the presentment in its first state is only considered a bill on which an indictment is framed (*m*).

The most usual presentment was by a grand jury at common law, or by a justice of peace (*n*), under 13 Geo. 3, c. 78, s. 24, for default in repair of some "highway, causeway, or bridge"; but that Act is now repealed by 5 & 6 Will. 4, c. 50, s. 1, so that the power of a justice to present any bridge is gone (*o*). By sect. 99, it is declared unlawful to take or commence any legal proceeding by way of presentment (*e.g.*, by a grand jury or justice) against the inhabitants of any parish, or other person, on account of any *highway* or *turnpike road* being out of repair; but as county bridges are excepted out of that Act by sect. 5, the power of a justice to present such a bridge is continued, and a hundred bridge is included in the exception (*p*).

This mode of prosecution by a grand jury, even for non-repair of a county bridge, is, however, disused.

Presentments
of constables.

In many counties constables were accustomed from early times to make presentment at the quarter sessions of various offences within their districts. They were, however, of no validity, unless they went before the grand jury, and made oath to the truth of the facts which they presented (*q*). As much expense and vexation had arisen from presentments by constables, which they were required to sign at a petty sessions, in order to their being delivered by the high constables to the ensuing quarter sessions, it was enacted by 7 & 8 Geo. 4, c. 38, that "no petty constables shall be required, at any petty session or elsewhere, to make, nor shall any high constable be required at any general gaol delivery, great session, or general or quarter session of the peace of England, to deliver any presentment respecting popish recusants, persons absenting themselves from their parish church, or any other place of religious worship licensed by authority, rogues and vagabonds, inmates, retailers of brandy, iugrossers, forestallers, regrators, profane swearers and cursers, servants out of service, felonies and robberies, unlicensed or disorderly ale-houses, false weights

(*l*) 2 Hawk. bk. 2, c. 25, s. 1.

(*m*) 4 Bla. Com. 301.

(*n*) See *R. v. Derbyshire (Inhabitants)* (1832), 3 B. & Ad. 147.

(*o*) See *R. v. Mawgan (Inhabitants)* (1838), 8 A. & E. 496.

(*p*) *R. v. Half Hundred of Chart and Longbridge* (1870), 39 L. J. M. C. 107.

(*q*) See *R. v. Bridgwater and Taunton Canal Company* (1827), 7 B. & C. 514, sub nom. *R. v. Somersetshire (Justices)*, 1 Man. & R. 272.

and measures, highways and bridges, riots, routs, and unlawful assemblies, and whether the poor are well provided for, and the constables are legally chosen and sworn." As this enumeration comprises almost, if not all matters, which ever were presented, it may be fairly assumed that presentments by constables will be discontinued, and that in future indictments will be substituted in the necessary cases; particularly as a presentment when made by a constable carries no case further till it is taken up by a private prosecutor.

SECTION 5.

OF PROSECUTION BY INFORMATION.

Prosecutions by information at the quarter sessions can only be instituted in cases where, by a penal statute, an informer is allowed to take this course to recover the penalty (*r*); in former times there were a great number of statutes in force which imposed penalties recoverable at quarter sessions by informers, but this proceeding is generally disused, if, indeed, any statute now exists under which such a proceeding could be instituted.

(*r*) See 21 Jac. 1, c. 4; 18 Eliz. c. 5; 31 Eliz. c. 5; 1 Chitt. Cr. L. 1st ed. p. 167.

CHAPTER V.

OF PRELIMINARIES TO TRIAL.

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SECTION 1.

OF FORMING A SECOND COURT.

Dividing the court.

In counties.

WHEN the grand jury have been charged, and have retired to their room to consider the bills brought before them, the justices have to consider whether the quantity of business to be transacted, and the time which will be required for its execution, demand the sitting of a second court. Where the business, from the extent of the jurisdiction or any other cause, is likely to occupy an inconvenient length of time, advantage may be taken of 21 & 22 Vict. c. 73, s. 9, which enacts, that whenever and so often as any court of quarter sessions, or general sessions, or adjourned quarter sessions of the peace, is assembled for the despatch of business, the justices then present may, if and when in their discretion they see fit so to do, appoint two or more justices, [*one of whom shall be of the quorum,*] to form a second court for the purpose of hearing and determining such business as may be referred to them; and the proceedings by and before such second court shall be as good and effectual in the law, to all intents and purposes, as if the same were had before the court assembled and sitting as usual in its ordinary place of sitting, and shall be enrolled and recorded accordingly.

And when a second court is formed, as aforesaid, and orders, rules and regulations have been made for the apportionment of business, such orders, rules and regulations shall continue in force as long as may be thought expedient, without the necessity of renewing such orders, rules and regulations, at each succeeding session (*a*).

(*a*) 21 & 22 Vict. c. 73, s. 10.

The clerk of the peace, or his deputy, whenever a second court is formed as aforesaid, shall appoint a fit and sufficient person to record the proceedings so had before the justices at such second court; and such proceedings shall be delivered over to the clerk of the peace, or his deputy, and shall be deemed to be a part of the records of the session, as if the same proceedings had been recorded by the clerk of the peace himself. And it shall be lawful for the justices assembled at the sessions to make an order upon the treasurer of the county to pay to the clerk of the peace such sum as they shall deem a fit and reasonable remuneration to the clerk of the peace for such purpose as aforesaid. And it shall be lawful for such justices to appoint an additional crier, and to grant him such remuneration, to be paid by the treasurer of the county (*b*).

The power to form a second court in boroughs rests upon the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), sect. 168 of which enacts as follows:—

In boroughs.

Sect. 168.—(1) If at any time it appears to the recorder that the quarter sessions are likely to last more than three days, including the day of assembling, he may in his discretion, but subject to the provisions of this section, order a second court to be formed, and appoint by writing signed by him a barrister of five years' standing to preside therein, and try such felonies and misdemeanours as shall be referred to him therein.

(2) The barrister so appointed shall be styled assistant recorder, and shall have and exercise the same powers, subject to the same regulations (saving as regards the making of the declaration faithfully and impartially to execute the office of recorder) as the recorder; and the proceedings had by and before the assistant recorder shall be as effectual as if had by or before the recorder, and shall be enrolled and recorded accordingly.

(3) But the assistant recorder shall not have any power or jurisdiction except while the recorder is sitting in quarter sessions; save that the assistant recorder may finish any case in which the prisoner has pleaded, and in the trial whereof the assistant recorder is actually engaged at the time when the recorder ceases to sit, and may sentence any prisoner tried before him, but not then sentenced.

(4) If at any time during the sitting of the second court the recorder is of opinion that it is no longer required, he may direct the assistant recorder at a proper opportunity to adjourn it.

(*b*) 21 & 22 Vict. c. 73, s. 11. The special enactments relating to the county of Middlesex were repealed by the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42 (11), so that that county now seems to stand on the same footing as other counties in this respect.

(5) Where a second court is so formed, the clerk of the peace shall, on the request of the recorder, appoint an assistant, and the recorder shall appoint an additional crier for the second court.

(6) The recorder shall not exercise the powers given by this section unless—

(a) It has been before each quarter sessions certified to him in writing by the mayor or two aldermen or the town clerk that the council have resolved that it will be expedient that those powers be exercised; and

(b) The name of the barrister to be appointed has at some previous time been approved by the secretary of state as that of a fit person to be from time to time so appointed.

(7) Where a resolution of the council is so certified, the resolution and certificate shall, if the resolution so provides, continue in force for twelve months from the date of the resolution, and during such continuance no fresh resolution or certificate shall be necessary.

(8) An assistant recorder, assistant clerk of the peace and additional crier shall have remuneration as appearing by the fourth and fifth schedules.

(9) The powers given to the recorder by this section may be exercised by the deputy recorder.

(10) Appointments made and certificates given under this section shall not be subject to any stamp duty or other tax.

The fourth schedule prescribes remuneration as follows:—

For every day not exceeding two, or by resolution of the council, with the sanction of the secretary of state, not exceeding six:—

To an assistant recorder Ten guineas.

To an assistant clerk of the peace . . Two guineas.

To an additional crier Half a guinea.

The remuneration is payable on a certificate from the recorder showing the amount due.

The fifth schedule makes the remuneration so certified by the recorder payable out of the borough fund without any order by the council.

The proper time for exercising the authority conferred by these statutes is when the grand jury have received their instructions from the chairman, and have retired to their room. The most natural distribution, in order to relieve jurors and witnesses from the labour and expense of lengthened attendance, and to meet the convenience of counsel, seems to be, that when the division takes place, one court shall undertake that portion of the criminal business consisting of undefended cases, while the other takes the defended cases. Appeals and matters over which the sessions have summary jurisdiction should be decided before the full bench.

With reference to the county of London, the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 42, provides as follows:—

Sect. 42.—(6) Separate courts of quarter sessions may be held at different parts of the county of London at the same time if so directed by the county council with the approval of a secretary of state, and every court of general sessions of the peace for the county of London and every adjournment thereof shall have the same jurisdiction in all respects, including the power of hearing and determining appeals, as if such court were quarter sessions.

(7) The London County Council may from time to time submit to a secretary of state a scheme for regulating the holding of courts of quarter sessions in London, either at any one place or at different places, and in the latter case either at the same time or at different times, and for determining the legal character of each sessions so held, that is to say, whether quarter, general, original or adjourned sessions, or otherwise, and for making such regulations respecting committals for trial, recognizances, depositions and other matters as are necessary or proper for giving effect to the scheme, and such scheme, when approved by a secretary of state, shall be published in the London Gazette, and thereupon shall have effect as if it were enacted in this Act (c).

SECTION 2.

PRELIMINARIES TO TRIAL—PROCESS TO PROCURE THE ATTENDANCE OF THE ACCUSED.

Upon the finding of the bill by the grand jury, the court proceed to try it, if they have jurisdiction to try, and their hands are not stayed by a writ of certiorari, or an application to postpone the trial; as to the former, see "*Certiorari*," *post*, and as to the postponement of a trial, see *post*, p. 221.

The first step is to procure the attendance of the accused, in order to arraign him on the charge. If in custody, the gaoler causes him to be placed at the dock, on being called to do so by the clerk of the peace; but if he be not in custody, and has been bailed, he is called upon to surrender; and if he does not answer, it is necessary to consider the steps to be taken to procure his attendance.

(c) The London County Council settled a scheme under this section on the 1st March, 1892, which was approved by the secretary of state on the 24th March, 1892, and this scheme is now in force. It will be found in Appendix C.

Process to
bring party
indicted into
court after
bill found
against him.

Certificate of
indictment
being found
and warrant
thereon.

Where any indictment shall be found by the grand jury in any court of general or quarter sessions of the peace against any person who shall then be at large, and whether such person shall have been bound by recognizance to appear to answer to the same or not, the person who shall act as clerk of the peace at such sessions at which the said indictment shall be found, shall at any time afterwards, after the end of the sessions of the peace at which such indictment shall have been found, upon application of the prosecutor, or of any person on his behalf, and on payment of a fee of one shilling, if such person shall not have already appeared and pleaded to such indictment, grant unto such prosecutor or person a certificate of such indictment having been found; and upon production of such certificate to any justice or justices of the peace for any county, riding, division, liberty, city, borough or place in which the offence shall in such indictment be alleged to have been committed, or in which the person indicted in and by such indictment shall reside or be, or be supposed or suspected to reside or be, it shall be lawful for such justice or justices, and he and they are hereby required to issue his or their warrant to apprehend such person so indicted, and to cause him to be brought before such justice or justices, or any other justice or justices for the same county, riding, division, liberty, city, borough or place, to be dealt with according to law; and afterwards if such person be thereupon apprehended and brought before any such justice or justices, such justice or justices, upon its being proved upon oath or affirmation before him or them that the person so apprehended is the same person who is charged and named in such indictment, shall, without further inquiry or examination, commit him for trial, or admit him to bail in manner hereinafter mentioned. Or if such person so indicted shall be confined in any gaol or prison for any other offence than that charged in the said indictment at the time of such application and production of the said certificate to such justice or justices as aforesaid, it shall be lawful for such justice or justices, and he and they are required, upon its being proved before him or them upon oath or affirmation that the person so indicted and the person so confined in prison are one and the same person, to issue his or their warrant, directed to the gaoler or keeper of the gaol or prison in which the person so indicted shall then be confined as aforesaid, commanding him to detain such person in his custody until by his Majesty's writ of *habeas corpus* he shall be removed therefrom for the purpose of being tried upon the said indictment, or until he shall otherwise be removed or discharged out of his custody by due course of law (*d*).

If the accused be under recognizance to appear, but be in the prison of the court under commitment, he may be brought up by order of the court, for it is enacted, that where recognizances shall have been entered into for the appearance of any person to take his trial for any offence at any court of criminal jurisdiction, and a bill of indictment shall be found against him, and such person shall be then in the prison belonging to the jurisdiction of such court under warrant of commitment or under sentence for some other offence, it shall be lawful for the court, by order in writing, to direct the governor of the said prison to bring up the body of such person in order that he may be arraigned upon such indictment without writ of *habeas corpus*, and the said governor shall thereupon obey such order (e).

If there be recognizance to appear, but the party be in prison.

Where accused in the prison of the jurisdiction when indictment found.

Certificate of Indictment being found.

I hereby certify that at a court of general quarter sessions of the peace, holden in and for the (county) of at in the said (county) on a bill of indictment was found by the grand jury against A. B., for that he (&c., *stating shortly the offence*), and that the said A. B. hath not appeared or pleaded to the said indictment.

Form of certificate.

Dated this day of 19 .

J. D.,

Clerk of the peace of for the said (county (f)).

There is besides the now almost obsolete process in outlawry, in which proceeding the most scrupulous exactness is required, as where indictments are found in misdemeanour or crime inferior to felony, against parties who are not under recognizance to appear there, and do not appear, the prosecutor, if desirous to proceed to outlawry, may obtain a *venire facias ad respondendum*, which is in the nature of a summons to appear within fifteen days between the teste and return (g). This (or a *distringas* (h)) is the usual process on an indictment against a parish for not repairing a highway; and is served on any two of its inhabitants who live within the county (i). If the defendant does not appear, and the sheriff returns that he has summoned him, a *distringas* may be issued, and an *alias* from time to time, by which he loses issues on each default; but if the sheriff returns that he is not found, then upon non-appearance a *capias* issues, and the prosecutor may go on to outlawry, as in felony (k).

Process to compel appearance.

(e) 30 & 31 Vict. c. 35, s. 10.

(f) 11 & 12 Vict. c. 42, sched. (F.).

(g) 1 Ch. Cr. L. 1st ed. 350; 4 *id.* 212.

(h) 4 Ch. Cr. L. 1st ed. 213.

(i) *R. v. Clifton* (1794), 5 T. R. 503, 505; 1 Chit. Cr. L. 351.

(k) For the procedure to outlawry, see Short & Mellor's Practice of the Crown Office.

Bench
warrant.

But the prosecutor has also a right in the last-mentioned cases, as well of misdemeanour as felony, during the session at which the bill is found, or the articles exhibited, to have a *bench warrant* against the offender to apprehend him, and bring him immediately into court to answer, or, if the court is not then sitting, before the signing or some other justice of the county, &c., to find sureties for personal appearance at the then present, or at the next session. This warrant is obtained from the clerk of the peace, and must be signed by two justices at least, and, as is said by Hawkins (*l*), while the court is sitting. If the sessions are over, the clerk of the peace will, on application of the prosecutor, grant a *certificate* of the indictment having been found, on which any judge of the King's Bench, or justice of peace of the proper county acting out of session, will grant a warrant for apprehending the defendant, and oblige him to enter into recognizance to appear at the next sessions to answer the indictment, or, for want of sureties, will commit him (*m*). But the better course now is to get a certificate and proceed under 11 & 12 Vict. c. 42, s. 3, *ante*, p. 192.

Where the party indicted is under recognizance to appear at the sessions at which the indictment is found, no process can be had against him *during* that session; because, being looked on at law as one day, whatever may be its duration, the defendant has the whole of it in which to make his appearance (*n*). But if he has not appeared, the prosecutor may bespeak a bench warrant during the session, which will, it is said, be issued at the close thereof (*o*). As to the backing of warrants for execution in other counties than that in which they were granted, see 11 & 12 Vict. c. 42, s. 11.

Form of Bench Warrant.

Form of bench warrant. Middlesex, } To all constables, headboroughs and other his Majesty's
to wit. } officers and ministers within the county of Middlesex, and to every one whom it may concern.

These are to will and require and in his Majesty's name to charge and command you upon sight hereof to bring before us, his Majesty's justices of the peace for the county aforesaid, at the sessions of the peace (or general quarter sessions of the peace) now holden at the Sessions House on Clerkenwell Green, in and for the said county, the body of A. B., who stands indicted before us at this same session for a trespass and assault (*nature of the offence*), if the court be then and there sitting, or if not, before us or some other of his Majesty's justices of the peace of the same county, to find sufficient sureties for his personal appearance at this present sessions, to answer this said indictment, and all such other matters as on his Majesty's behalf shall be objected against him; and if he cannot be taken during this present sessions, that then, as soon after

(*l*) 2 Hawk. c. 27, s. 8.

(*m*) See 1 Ch. Cr. L. 339, 340.

(*n*) 2 Salk. 607; 1 Ch. Cr. L. 342, 1st ed.

(*o*) *Ibid.*; 2 Hawk. c. 27, s. 8.

as he shall be taken, you bring or cause him to be brought before us or some other of his Majesty's justices of the peace of the said county, to find sufficient sureties; that is to say, two sureties in £ each for his personal appearance at the next sessions of the peace to be holden for the said county, to answer as aforesaid, and further to be dealt with according to law. Hereof you are not to fail at your peril.

Dated in open session, at the Sessions House, Clerkenwell Green, aforesaid, this day of , in the year of our Lord

C. D. and E. F.

Having thus considered the duties of the grand jury, their jurisdiction, the form of their indictments, and the process compelling the appearance of the accused, we now proceed to consider the proceedings consequent on the appearance of the accused to take his trial; but, in the first place, it will be proper to notice an arrangement which is sometimes permitted, and then obviates the necessity of a trial at all.

SECTION 3.

OF COMPROMISE (OR SPEAKING WITH THE PROSECUTOR) WITH THE SANCTION OF THE COURT.

It will be proper in the first instance to notice an arrangement which, in cases of common assault, is not unfrequently made under the sanction of the court, in that stage of the prosecution which follows the finding of the bill, so as to render further inquiry needless. This is accomplished by the judicial recognition of an agreement between the prosecutor and the defendant, for the satisfaction of the former in respect of the injury he has personally suffered; upon which, in cases where the court see no objection, the defendant pleads guilty; and on the assent of the prosecutor being evidenced either by his own declaration in court, or by affidavit, or the proof of a release from him by the subscribing witness, the court authorizes the arrangement by imposing on the defendant the fine of a shilling, or some other small sum, for the injury done to the public peace (*q*), and taking his recognizance in 40*l*. to keep the peace for one twelvemonth, or other fixed period.

Prosecutions of this kind are sometimes terminated in this way by the recommendation of the court in different stages of the proceedings; and a like effect may be, indeed, produced after conviction; for it has been the common practice in Middlesex, even after judgment and fine set, to allow the defendant to make a private agreement with the prosecutor,

(*q*) See the distinction taken between dropping a prosecution for a public misdemeanour, and one for private injury to the prosecutor, *per* Le Blanc, J., *Edgcombe v. Rodd and others* (1804), 5 East, 303.

by an intimation from the court, that *the defendant may speak with him*; by which is understood, that a remission of the fine to the King may take place, on a portion of the sum assessed being paid to the prosecutor, as a recompense for his individual wrong.

Sir William Blackstone, after reprobating this practice of permitting the defendant to *speak with the prosecutor*, as it is termed, unless exercised by the judges in the superior courts of record, says, even a voluntary forgiveness by the party injured ought not in true policy to intercept the stroke of justice; but this opinion that the justices are improper persons to be entrusted with this power of allowing a compromise has been successfully combatted (*r*); and it is, moreover, now settled that assaults may form the proper subject of a compromise if confined to personal injuries, but not if they are of a public nature, or if accompanied by riots, or by the obstruction of a public officer in the execution of his duty (*s*).

SECTION 4.

OF ARRAIGNMENT.

Order of trial
of indict-
ments.

The practice of different courts of quarter sessions varies as to the order of trying indictments: they are, however, usually tried in the order in which they stand on the file of the clerk of the peace. He should file them in the order in which he receives them from the grand jury, after calling them over in their presence.

Felonies should be tried before misdemeanours, and those cases of misdemeanour in which the defendants are in custody before other misdemeanours. Of bills brought in at the same time by the grand jury, those in which any counsel is engaged for the prosecution are, by indulgence of the court, often heard before the others, if no special reason exists to the contrary.

Arraignment.

In cases of felony a convenient number of the prisoners are placed at the bar, viz., in the dock, for *arraignment*; which is the legal term for calling on a prisoner to answer to a charge of felony. The arraignment in felony consists of three parts: the calling the prisoner to the bar by his name, and requiring him to hold up his hand; the reading over the indictment to him; and the asking him whether he is guilty or not guilty (*t*).

(*r*) See 1 Chitt. Cr. L. 665.

(*s*) *Keir v. Leeman* (1844), 6 Q. B. 308; 9 Q. B. 371; *Goodall v. Lowndes* (1844), 6 Q. B. 464.

(*t*) 2 Hale, 219. See Dalton, 459, c. 185.

In felonies the rule is almost peremptory that the accused shall go into the dock (*u*), but not so in misdemeanours (*x*).

At the time of his arraignment the prisoner should be treated with all the humanity and gentleness which is consistent with the nature of the thing; for instance, he should not be handcuffed unnecessarily (*y*).

In the first place the officer addresses the prisoner thus:— Calling upon the prisoner.
“*A. B., hold up your hand,*” which is intended to identify him in court, viz., to the justices and the jury, as the party indicted, or to ascertain, if two or more are indicted, which is *A.* and which *B.* (*z*). A compliance with this requisition is not, however, indispensable (*a*); and it has been said that it is usual to omit it when a peer is to be tried *b*. If, therefore, the prisoner decline to hold up his hand, but make no objection that he is not the party intended (*c*), the trial may proceed.

The second proceeding, the reading of the indictment, is more material, because, as in cases of felony, the prisoner is not in general (*d*) allowed a copy; it is the only means by Reading the indictment.

(*u*) *R. v. Zulweta* (1843), 1 C. & K. 215; *R. v. St. George* (1840), 9 C. & P. 483; *R. v. Douglas* (1811), C. & M. 193. In the last-mentioned case the prisoner, upon his application to be allowed to stand outside the dock being refused, asked that some of his friends might stand beside him in the dock. Williams, J., the presiding judge, said that there was no objection to it, and accordingly three friends of the prisoner were allowed to remain with him in the dock during the trial.

(*v*) *R. v. Lovett* (1839), 9 C. & P. 462. In a misdemeanour, where the defendant defends himself, he may be permitted to come to the table. *Ibid.*

(*y*) 2 Hawk. c. 28, s. 1.

(*z*) *Ibid.* c. 38, s. 2; Dalt. c. 185, p. 459.

(*a*) *R. v. Radcliffe* (1746), 1 W. Bla. 3.

(*b*) 2 Hale, 219.

(*c*) If a collateral issue of identity be raised, it is always tried instantly by a jury impanelled on the spot by the sheriff. No peremptory challenges are allowed: *R. v. Radcliffe* (1746), 1 W. Bla. 4.

(*d*) *R. v. Mitchell* (1848), 3 Cox, C. C. 1; Burn's J., vol. iii., 30th ed., p. 39, tit. *Indictment*. The rule of practice at the Old Bailey against granting such a copy is alluded to in 15 East, 344; and Kelynge, 3; *Leggitt v. Tollervey* (1811), 14 East, 302, are cited. The right of a party indicted for felony to a copy of his indictment, as a record in which he is interested, after acquittal, is ably asserted by the reporters in the note to *Browne v. Cumming* (1829), 10 B. & C. 70. Since which the cases have been reviewed by Sir G. Lewin in the note to his Crown Reports, 205, *et seq.* In *Brangan's case* (1742), 1 Lea. 27, Willes, C. J., refused an application for the copy of an indictment for robbery, because it was not necessary to grant it, for that after demand made from the officer of a copy of the record of acquittal, he might be punished for not making it out. However, this is not the practice. See Carthew, 421; Ld. Raym. 253. But it has been lately held that the justices of a county, &c. are bound to make up correctly and according to the fact the record of any conviction, acquittal or proceedings relating to an indictment preferred at the quarter sessions, even though the proceedings are invalid for want of due adjournment; and the reason alleged is, that the prisoner is entitled to such record when made up, to make such use of as he can,

which, before he pleads, he can ascertain the precise charge to which he is to answer. This was required to be done in English, even at the time when the proceedings themselves were written in Latin (e). It should always be done slowly and distinctly, putting the charge into the second person, as thus: "*You A. B. stand indicted by the name of A. B. late of the parish of Madley, in the county of Hereford, labourer, for that you, on, &c.,*" reading the whole indictment in the same manner. If the prisoner desire it, he is entitled to have it read very slowly and distinctly over (f), so as to enable a copy to be taken, at least in shorthand, as the officer proceeds, or to frame a plea of *autrefois acquit* (g).

Mode of
arraignment
on indictment
charging a
previous con-
viction.

The proceedings upon any indictment for committing any offence under the Larceny Act, 1861, after a previous conviction or convictions shall be as follows (that is to say); the offender shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury shall be charged in the first instance to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he shall then, and not before, be asked whether he had been previously convicted as alleged in the indictment; and if he answer that he had been so previously convicted, the court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions; and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall for all purposes be deemed to extend to such last-mentioned inquiry (h).

The rules above contained are, with the necessary variations, to apply to any indictment for committing a crime (as defined by the 34 & 35 Vict. c. 112, s. 20) after a previous conviction for a crime, whether the crime charged in such indictment, or the crime to which such previous conviction relates, be or be not punishable under 24 & 25 Vict. c. 96 (i), and a similar

e.g., in support of a plea of *autrefois convict*: *R. v. Middlessex (Justices)*, *In re Bowman* (1834), 5 B. & Ad. 1113; and see *post*, "Charging Jury with Prisoner."

(e) 36 Edw. 3, c. 15; 2 Hawk. c. 28, s. 3; 4 Bla. Com. 323; 2 Hale, 219.

(f) *Vandercomb's case* (1796), 2 Lea. 711, 712; *R. v. Parry and others* (1837), 7 U. & P. 836; *R. v. Dowling* (1848), 3 Cox, C. C. 509. It would seem from the last-mentioned case that the prisoner is not entitled as a matter of strict law to have the indictment read more than once.

(g) Burn's J., tit. *Sessions*.

(h) 24 & 25 Vict. c. 96, s. 116.

(i) 34 & 35 Vict. c. 112, s. 9.

proceeding is required under the Coinage Act (24 & 25 Vict. c. 99), s. 37.

The practice above described is also applied where the previous conviction forms part of the offence itself, and proof of it is necessary to give the court jurisdiction over the principal offence, as, for example, in such cases as damaging trees, after two previous summary convictions for that offence under 24 & 25 Vict. c. 97, s. 22, and uttering base coin after a previous conviction for uttering under 24 & 25 Vict. c. 99, s. 12 (*k*).

Where a prisoner is insane at the time of arraignment (*l*), Insanity of prisoner.

though in full possession of his senses when he committed the offence, it has been a rule from the earliest times that he shall not be arraigned for it; the true reason being, not that a man who has so become insane may not be a fit object of example, but because he is incapable of pleading to the indictment with the advice and caution which he ought (*m*). So if he become insane after plea, and before judgment, he cannot be tried, for he is unable to make his defence, and the jury may be discharged of him (*n*); if after conviction, and before judgment, he loses his senses, judgment shall not be pronounced; and if after judgment and before conviction, execution shall be stayed; for he cannot say anything in bar of execution, or assign error in the judgment (*o*). But a grand jury have no right to ignore a bill on account of the insanity of the party charged at the time of preferring the bill, however clearly shown; for if they believe that the acts proved, if done by a person of sound mind, would have amounted to the offence charged, their duty is to find the bill, in order to empower the court to order the prisoner's detention, if he is found insane by a petty jury, according to 39 & 40 Geo. 3, c. 94, s. 2, before his arraignment for the offence (*p*). In order to ascertain whether a party indicted is, at the time of his arraignment, or at any time during his trial, insane, or whether he merely counterfeits, the court, as well in misdemeanour (*q*) as felony, may *ex officio* impanel and swear a jury to inquire (*r*), and if they find that he is, he was formerly remanded till the next

Impannelling jury to inquire of insanity.

(*k*) *R. v. Martin* (1869), L. R. 1 C. C. R. 214.

(*l*) Insanity at time of committing the crime is treated of, *post*, as a defence to a charge.

(*m*) 1 Hale, 34, 35, 370; 3 Inst. 4; Hawk. b. 1, c. 1, s. 4; 4 Harg. St. Tr. 205, 206. Before 1800, this rule only embraced *capital* offences: 2 Hale, 33, &c., &c.; but by sect. 2 of 39 & 40 Geo. 3, c. 94, the benefit of it is applied to *all* offences soever: *R. v. Little* (1821), R. & R. 430.

(*n*) 1 Hale, P. C. c. 4, 35.

(*o*) 1 Hale, P. C. 35. As to prisoners becoming insane after sentence, see 47 & 48 Vict. c. 64.

(*p*) *R. v. Hodges* (1838), 8 C. & P. 195.

(*q*) *R. v. Little* (1821), R. & Ry. 430.

(*r*) 39 & 40 Geo. 3, c. 94, s. 2; 1 Hale, 370; and *R. v. Goodc* (1837), 7 A. & E. 536.

session (*s*), or till his incapacity was removed (*t*); but now the finding is recorded, and the party must be kept in strict custody till the pleasure of the crown is known (*u*). If the insane party, by any oversight, or by act of the gaoler, pleads to the indictment, so that the jury is charged to try it, they may be discharged of him (*x*). Even if his insanity supervenes, or is discovered after judgment and before sentence, a jury should be impannelled as above (*y*); though it may be questioned if a mere finding that he is *then* insane will authorize his confinement under the Act just mentioned.

Again, if a person charged with any offence is brought up to be discharged *for want of prosecution*, and appears to be insane, the court orders a jury to be impannelled to try the party's sanity, and if he is found insane, they order him to be kept in strict custody in such place and manner as to such court shall seem fit, till the sovereign's pleasure shall be known (*z*). The proofs necessary to establish insanity are those of medical and other persons acquainted with the case. As to standing mute of malice, see *post*, p. 218.

By the Trial of Lunatics Act, 1883 (46 & 47 Vict. c. 38), where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time the act was done or omission made, then, if it appears to the jury before whom such person is tried that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission. (Sect. 2 (1).)

Where such special verdict is found, the court shall order the accused to be kept in custody as a criminal lunatic, in such place and in such manner as the court shall direct till his Majesty's pleasure shall be known; and it shall be lawful for his Majesty thereupon and from time to time to give such order for the safe custody of the said person during pleasure, in such place and in such manner as to his Majesty may seem fit. (Sect. 2 (2).)

All provisions in any previous Act, or in any rules or orders made under any previous Act, having reference to a person or persons acquitted on the ground of insanity, are to apply to

(*s*) 1 Hale, 370.

(*t*) *Ibid.* 34.

(*u*) 39 & 40 Geo. 3, c. 94, s. 2.

(*x*) 1 Hale, 35.

(*y*) *Ibid.* 370.

(*z*) 39 & 40 Geo. 3, c. 94, s. 2.

any person in respect of whom such a special verdict is found. (Sect. 2 (4).)

By the Criminal Lunatics Act, 1884 (47 & 48 Vict. c. 64), where it appears to any two members of the visiting committee of a prison that a prisoner in such prison, not being under sentence of death, is insane, they shall call to their assistance two legally qualified medical practitioners, and such members and practitioners shall examine such prisoner, and inquire as to his insanity, and after such examination and inquiry may certify in writing that he is insane. (Sect. 2 (3).)

Thereupon a secretary of state may, if he thinks fit, by warrant direct such prisoner to be removed to the asylum named in the warrant, and thereupon such prisoner shall be removed to and received in such asylum, and, subject to the provisions of this Act relating to criminal discharge and otherwise, shall be detained therein, or in any other asylum to which he may be transferred in pursuance of this Act, as a criminal lunatic, until he ceases to be a criminal lunatic. (Sect. 2 (1).)

Where it is certified by two legally qualified medical practitioners that a person being a criminal lunatic (not being a person with respect to whom a special verdict has been returned that he was guilty of the act or omission charged against him, but was insane at the time when he committed the act or made the omission) is sane, a secretary of state, if satisfied that it is proper so to do, may by warrant direct such person to be remitted to prison, to be dealt with according to law. (Sect. 3.)

A secretary of state by warrant may absolutely discharge any criminal lunatic, and may also discharge any criminal lunatic on such conditions as to the duration of such discharge and otherwise as he may think fit. (Sect. 5 (2).) (a)

“Prison” in this Act means any prison or place of confinement to which a person may be committed whether on remand or for trial, safe custody, or punishment, or otherwise, under any other than civil process; and “prisoner” means any person so committed. (Sect. 16.) The Act therefore enables a criminal lunatic to be dealt with at any stage of the proceedings, and the exercise by the secretary of state of the powers conferred thereby stays the hand of the court under whose jurisdiction a prisoner is at the date when he exercises those powers (b).

If, on the apprehension of the party indicted, or since,

(a) The Act contains numerous provisions relative to the maintenance, treatment, removal and discharge of criminal lunatics generally, including those detained under the Trial of Lunatics Act, 1883.

(b) *Ex parte Collins* (1899), 31 Law Journal Newspaper, 132. Broadmoor Prison is the prison specially appointed for the confinement of criminal lunatics. See Stat. Rules and Orders Revised, vol. 4, p. 972, and for rules governing the prison, see *ibid.* p. 973.

Order to re-
turn money
found on
accused on
his appre-
hension.

money, &c. has been taken from his person, there have been cases in which, on its appearing clearly to the court from the depositions or on affidavit, that the money, &c. so taken, was in no way material to support the charge against him or connected with it, judges have granted motions for its being returned to him, in order that he might not be deprived of the means of defence afforded by it. But the discretion of a court will never be thus exercised where, from any testimony or depositions before it, there is reason to believe that the money or other article of which the prisoner has been so deprived, is in *any* way connected with the offence charged, as if it belonged to the prosecutor or some third person; or if a probability appears that it was stolen, or the produce of stolen property; or if it forms part of the evidence to be adduced in support of the indictment (c).

SECTION 5.

OF MOTIONS TO QUASH THE INDICTMENT.

Motions to
quash.

When the indictment is found, the defendant may move to quash it, or he may demur to it, or, upon arraignment, he may plead specially in abatement or in bar, or generally, guilty or not guilty.

If it appears to a court of quarter session, either on its own view, or the suggestion of the prisoner's counsel, or of an *amicus curiæ*, that an indictment is on the face of it or can be made to appear by affidavit to be obviously insufficient, that court may in its discretion quash it without putting the prisoner to demur, or plead to it. For instance, in cases falling within the Vexatious Indictments Act, where the requirements of that Act have not been complied with, a motion to quash if supported by an affidavit, or if the facts otherwise sufficiently appear, will succeed as of course (d).

But *semble*, it is not every non-fulfilment of a condition precedent which will induce the court to quash an indictment

(c) See *R. v. O'Donnell* (1835), 7 C. & P. 138; *R. v. Jones* (1834), 6 C. & P. 343; both cases before Patteson, J.: *R. v. Barnett* (1829), 3 C. & P. 600. An instance of taking away the watch, &c. of a party charged with rape was severely censured, and its immediate return ordered: *R. v. Kinsey* (1836), 7 C. & P. 447, Gurney, B., and Patteson, J. In these cases the judges expressed themselves strongly upon the impropriety of constables taking possession of money, &c. in no way connected with the charge. The withholding of money is particularly to be reprobated, as tending to prevent the prisoner making a full defence to the charge.

(d) *R. v. Heane* (1864), 33 L. J. M. C. 115; *R. v. Fudge* (1864), 33 L. J. M. C. 170.

on motion; accordingly, where an indictment was preferred under a statute which required the consent to the prosecution of either the attorney-general or the commissioners of customs, the court refused to quash the indictment upon a motion grounded upon an allegation that the requisite consent had not been given, and left the defendant to demur or plead as he might be advised (*e*). Indictments will be quashed on motion for defects of jurisdiction clearly appearing (*f*); but if the alleged defect of jurisdiction was not clear the court would probably decline to quash, and leave the defendant to demur or plead specially, as the case might require. The entire absence of a necessary averment is ground for quashing, and if the court were satisfied of the necessity of the averment omitted, and that by reason of its omission the indictment would be bad after verdict, it would be almost a matter of course to quash the indictment (*g*). But the court is not bound *ex debito justitiæ* in any case to quash an indictment on motion, and will often not do so if it thinks it more proper that the objection to the indictment should be taken by way of demurrer (*h*).

With reference to motions to quash for want of jurisdiction, courts of quarter session, as has already been pointed out (*i*), never had any jurisdiction to try indictments for perjury, forgery or night poaching, and it was held before 5 & 6 Vict. c. 38, that they had no jurisdiction even to inquire into the commission of these offences; and therefore that an indictment found for any such offence at quarter sessions was void, and, although removed into the Court of King's Bench by *certiorari*, and sent down to the assizes to be tried, could not be proceeded upon, but must be quashed (*k*). By the last-mentioned statute, by which courts of quarter session were deprived of jurisdiction over a large number of crimes in addition to perjury and forgery, it is enacted (sect. 2) that it shall be lawful for any judge of one of his Majesty's superior courts at Westminster, acting under any commission of oyer and terminer and gaol delivery for any county, to issue, if he shall think fit, any writ or writs of *certiorari* or other process, directed to the justices of the peace acting in and for such

(*e*) *R. v. Burnley* (1843), 13 L. J. M. C. 29.

(*f*) *R. v. Bainton* (1737), 2 Stra. 1088; *per* Lord Mansfield, in *R. v. Williams* (1757), 1 Burr. 389.

(*g*) *R. v. Wilson* (1844), 14 L. J. M. C. 3; *R. v. Tremearne* (1824), Ry. & M. 147; *R. v. Upton-on-Severn* (1833), 6 C. & P. 133; *R. v. Roysted* (1765), Kenyon, 255; *R. v. Norton* (1838), 8 C. & P. 196.

(*h*) *R. v. Taylor* (1841), 9 Dowl. P. C. 600; *R. v. Birmingham and Gloucester Ry. Co.* (1842), 3 Q. B. 223. See also 2 Burr. 1127, and cases collected 1 Chit. Cr. L. 1st ed. 299; and 2 Hawk. b. 2, ch. 25, s. 146.

(*i*) *Ante*, p. 3.

(*k*) *R. v. Haynes* (1825), Ry. & M. 298; *R. v. Rigley* (1839), 8 C. & P. 770; *Smith's case* (1588), Cro. Eliz. 87.

county, riding, division or liberty, or to the recorder of any borough, situate within the said county, commanding the said justices and recorder severally to certify and return into the court holden under the authority of such commission of oyer and terminer and gaol delivery *all indictments* or presentments found or taken before any of the said justices of the peace, or recorder, *of any offences which, after the passing of this Act, such justices or recorder will not have jurisdiction to try*, and the several recognizances, examinations and the depositions relative to such indictments and presentments; and also, if necessary, any writ of *habeas corpus*, to cause any person or persons who may be in the custody of any gaol or prison charged with any such offence to be removed into the custody of the keeper of the common gaol of the county, so that the same offences may be dealt with, tried and determined according to law, under the authority of the said commission.

Unless this statute had reference only to indictments already found at quarter sessions before the commencement of the Act (which certainly would not seem to be the opinion of the statute law revision commissioners), it would appear to recognise the validity of indictments found at quarter sessions for offences not triable there; and upon motion to quash any such indictment the court might be well advised to consider whether, in view of this statute, the proper course would not be either to return the indictment before the justices of assize to be there proceeded upon, or to retain it pending an application under the statute to the judge of assize for a *certiorari* to remove it.

As to quashing indictments which do not set out the offence charged with sufficient fulness and particularity, not only are indictments which altogether omit some necessary averment liable to be quashed, but also indictments which state necessary averments with insufficient precision. But there is this distinction to be observed between these two classes of defective indictments—that where there is an entire absence of a necessary averment, the indictment will be bad even after verdict, and unless the court accedes to the motion to quash the whole proceedings will probably prove abortive (which affords a strong reason for quashing the indictment), whereas, where the indictments contain a necessary averment which *is stated, but with insufficient particularity*, so that the defect will be cured by verdict, the matter may very well be left for the defendant to raise by demurrer, which he must do, if at all, before plea; and the argument for quashing on motion is not therefore so strong.

In this connection it is necessary to consider the effect of sect. 21 of the Criminal Justice Act, 1826 (7 Geo. 4, c. 64), which enacts *inter alia* that where the offence charged has been created by any statute, or subjected to a greater degree of punishment, or excluded from the benefit of clergy by any statute, the indictment or information shall after verdict be

held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute. At the present day, therefore, where an indictment describes the offence in the words of the statute creating it, and motion is made to quash it on the ground that the offence is not stated with sufficient particularity, the argument that the indictment would be bad after verdict on arrest of judgment or on writ of error will no longer be open to the prisoner, nor will any such consideration have any weight with the court; but the court will be actuated solely by the consideration whether the prisoner is prejudiced in his defence by reason of the generality of the charge as stated in the indictment. If the court should be of opinion that, although the indictment would be good after verdict, yet the prisoner will be prejudiced in his defence by reason of the generality with which the charge is stated, the court will either quash the indictment or (in a case of misdemeanour) direct the prosecutor to deliver to the defendant proper particulars of the charge, and see that the evidence adduced in support of the indictment is limited to the particulars so given.

Accordingly, an indictment which alleged the unlawful obtaining of goods by "divers false pretences" would be bad on demurrer or on motion to quash the indictment, but after verdict of guilty is cured, as it will then be intended that proper legal evidence of false pretences of existing facts was before the jury, and that the court had jurisdiction to try (*m*).

Quashing the indictment is discretionary with the court.

The proper time to move on behalf of a *defendant* to quash an indictment is before demurrer, or at least before plea (*n*); but now every objection to any indictment for any formal defect, apparent on the face of any indictment, must be taken by the defendant, if taken by motion to quash such indictment, before the jury shall be sworn, and thereupon the court may amend the indictment (*o*), and the trial may proceed; but the *court* may quash it after plea and before verdict, if the objection is then first discovered by them, and this course will be taken where the indictment is so defective that it would be bad after verdict (*p*).

A *prosecutor* may apply to quash his own indictment for its insufficiency (*q*) at any time before actual trial commenced (*r*);

(*m*) *R. v. Goldsmith* (1873), L. R. 2 C. C. R. 74; *Latham v. R.* (1864), 33 L. J. M. C. 197.

(*n*) *R. v. Frith* (1738), 1 Lea. 10; *R. v. Rookwood* (1696), Holt's R. 684; see note, *R. v. Semple* (1786), 1 Lea. 420.

(*o*) 14 & 15 Vict. c. 100, s. 25, *post*, p. 208.

(*p*) *R. v. Goldsmith*, *sup.*; *R. v. Upton-on-Severn* (1833), 6 C. & P. 134; *R. v. Norton* (1838), 8 C. & P. 196.

(*q*) *R. v. Stowell* (1841), 1 D. P. C. (N. S.) 320, *per* Patteson, J.; see 1 Ch. Cr. L. 1st ed. 299.

(*r*) *R. v. Webb* (1764), 3 Burr. 1468.

Indictments
found without
jurisdiction.

and it seems that *he* may so move on a like ground after verdict for the crown if judgment has not been pronounced (*s*); but he cannot do so after demurrer and judgment thereon (*t*). The usual terms of granting this motion are, disclosure of the prosecutor's name and payment of any extra costs, *e.g.*, of *certiorari*, incurred by the defendant (*u*), and an amended bill at least *preferred* against the defendant (*x*) so as to be substituted for the first, and stand in the same situation (*y*); or the defendant must be put on his trial (*z*). It would seem that the more serious the crime charged is, the less inclined will the court be to summarily quash an indictment on motion (*a*).

Part of an indictment may be quashed and the rest be proceeded upon; thus, if since the Vexatious Indictments Acts an indictment has been preferred consisting of several counts, some of which are not properly inserted by reason of those statutes, such counts only might be quashed and not the whole indictment (*b*). The proper way of raising the question whether an indictment has been properly quashed is by writ of error (*c*).

SECTION 6.

OF DEMURRERS.

General
demurrers.

After reading the indictment the clerk of the peace addresses the prisoner thus: "How say you, A. B., are you guilty or not guilty of the felony whereof you stand charged?" The defendant may, however, instead of pleading either guilty or not guilty, decline to answer the indictment on the ground that it is bad in point of law, and he does this by a demurrer. Demurrers to an indictment are of two kinds, general demurrers, and demurrers in abatement. The former state,

(*s*) In a case at the Old Bailey, where the prisoner was *discharged* from an indictment for repugnancy in point of form, and not on the merits, the judges remanded the prisoner to the end of the session, to give time for preferring another bill against him: *R. v. Gilchrist* (1795), 2 Lea. 657.

(*t*) *R. v. W. Smith* (1838), 2 Moo. & R. 109, Coleridge, J.

(*u*) *R. v. Glenn* (1820), 3 B. & A. 373; *R. v. Webb, sup.*; *R. v. Moore* (1732), Stra. 946; 1 Chit. Cr. Law, 1st ed. 299; Archb. Cr. Pl. & Ev. 22nd ed. 108.

(*x*) *R. v. Wynn* (1802), 2 East, 226.

(*y*) See 1 Chit. Cr. L. 1st ed. 299, 303, citing *R. v. Wynn, sup.*; *R. v. Webb, sup.*; *R. v. Glenn, sup.*

(*z*) *R. v. Frith* (1738), 1 Lea. C. C. 10.

(*a*) *R. v. Wetherill* (1781), Cald. 432.

(*b*) *R. v. Fuidge* (1864), 33 L. J. M. C. 170.

(*c*) *R. v. Wilson* (1844), 14 L. J. M. C. 3.

that generally on the face of the indictment no offence sufficiently appears, and the latter point out specific defects in point of form. Demurrers in criminal proceedings have never been much used, because the defendant might, formerly, in most cases after taking the chance of a complete acquittal on a plea of not guilty, have had, by motion in arrest of judgment, the same advantage as he could have had upon a demurrer, until 7 Geo. 4, c. 64, ss. 20, 21 (*d*), interfered to prevent motions in arrest of judgment for a number of formal defects. But demurrers might have been again resorted to but for 14 & 15 Vict. c. 100, s. 24, which enacted that no indictment should be held insufficient for any such defects; and by sect. 25, all objections for formal defects on the indictment in abatement were required to be made before the jury are sworn, when the indictment may be forthwith amended. Objections on the ground of duplicity, uncertainty or repugnance would fall within this class, and must be made within such time (*e*).

Demurrer in
abatement.

As to formal
defects on the
face of the
indictment.

With respect to matters of substance, the old practice of deferring the objection till after verdict will still probably prevail, because, when the objection goes to show that the facts stated on the record do not amount to a felony or misdemeanour, if the prisoner demurs, and judgment is given against him, that judgment is final against him on that indictment, and the Court of Crown Cases Reserved will not review such judgment, and the party is left to his writ of error as his only remedy against that judgment, while objections in arrest of judgment, after conviction upon verdict, are cognizable by that court upon a case reserved (*f*). It must, however, be borne in mind that the indictment may by 7 Geo. 4, c. 64, s. 21, be cured by the verdict of a defect which might have been fatal on demurrer or on motion to quash (*g*); and the same resort to a writ of error can still be had on the judgment of the court after verdict, for any manifest error on the record if the court will not reserve a case as on a judgment on demurrer (*h*).

An indictment charging the defendant with obtaining money by false pretences must set out the false pretences, in order that the court may see whether they are within the statute or not, and the defendant may know what he has to defend; and if it do not is demurrable, but this defect will be cured by verdict, and consequently can only be taken

(*d*) *Ante*, p. 156.

(*e*) *R. v. Guthrie* (1870), L. R. 1 C. C. R. 241; *Nash v. The Queen* (1864), 33 L. J. M. C. 94; *R. v. Warshaner* (1836), 1 Moo. 466.

(*f*) *R. v. Faderman* (1850), 1 Den. C. C. 568. See possible distinction suggested in this case between general and special demurrers as to finality of judgment for the crown.

(*g*) *R. v. Goldsmith* (1873), L. R. 2 C. C. R. 74.

(*h*) 1 Chit. Cr. L. 747.

advantage of by demurrer or motion to quash (*i*). A demurrer has the effect of putting the legality of the whole of the proceedings in issue, and compels the court to examine the whole record and give judgment thereupon (*k*); and the court must give judgment against the party whose pleading is the earliest to be defective (*l*).

Thus, if the indictment be bad, as if the subject of an indictment for larceny is not a proper subject for larceny, there will be judgment for the defendant, although he may have pleaded a bad plea in bar; or if it appear that the court have no jurisdiction over the offence charged in the indictment (*m*).

Formal defects in indictment.

By the 25th section of 14 & 15 Vict. c. 100, every objection to any indictment for any *formal* defect, apparent on the face thereof, must be taken by demurrer or motion to quash the indictment before the jury are sworn, and not afterwards. This, however, would rather apply to demurrers in abatement.

In form the demurrer should be on parchment and signed by counsel (*n*), though joinder in demurrer may be *ore tenus* (*o*).

The form of judgment for the defendant is, that he be dismissed and discharged from the premises.

On a general demurrer, in case of judgment for the crown, the judgment is final, and the prisoner is not allowed to plead over, because by a general demurrer the prisoner confesses all the material facts charged (*p*).

Where a prisoner has pleaded instead of demurring, the court may, as an indulgence, permit him to withdraw his plea and demur if application is made before any evidence has been given (*q*).

Form of General Demurrer to an Indictment or Information.

Form of demurrer.

And the said in his own proper person comes into court here, and having heard the said indictment [*or information*] read, says, that the said indictment [*or &c.*], and the matters therein contained in manner and form as the same are above stated and set forth, are not sufficient in law, and that he the said is not bound by the law of the land to answer

(*i*) *Hayman v. The Queen* (1873), L. R. 8 Q. B. 102; *R. v. Goldsmith, ubi sup.*

(*k*) *R. v. Fearnley* (1786), 1 T. R. 316; *Foster v. Jackson* (1616), Hob. 56.

(*l*) *Pigot's case* (1599), 5 Co. 29, p. 57.

(*m*) *R. v. Faderman* (1850), 1 Den. C. C. 568; *R. v. Fearnley, sup.*

(*n*) For reason why, see *R. v. Walker* (1843), 2 Moo. & R. 446, a case of a special plea in bar.

(*o*) *Ibid.*; *R. v. Shein* (1827), 2 C. & P. 634.

(*p*) *R. v. Fearnley* (1786), 1 T. R. 316; 1 Chit. Cr. L. 440; *R. v. Faderman* (1850), *sup.* See the last-mentioned case for distinction between general and special demurrers in this respect.

(*q*) *R. v. Purchase* (1842), C. & M. 617; *Kinloch's case* (1746), Fost. 16.

the same, and this he is ready to verify: Wherefore for want of a sufficient indictment [*or &c.*] in this behalf the said prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment [*or &c.*] specified.

Form of Joinder in Demurrer.

And , who prosecutes for our own said lord the King in this behalf, says, that the said indictment [*or &c.*], and the matters therein contained in manner and form as the same are above stated and set forth, are sufficient in law to compel the said to answer the same, and the said who prosecutes as aforesaid is ready to verify and prove the same as the court here shall direct and award: Wherefore, inasmuch as the said has not answered to the said indictment, nor hitherto in any manner denied the same, the said for our said lord the King prays judgment, and that the said C. D. may be convicted of the premises in the said indictment specified.

Form of
joinder in
demurrer.

SECTION 7.

SPECIAL PLEAS—(a) IN ABATEMENT; (b) IN BAR.

After the indictment has been read, and when the prisoner is called upon to plead to it, is the time to plead in abatement (*r*) any misnomer or other defect apparent on the face of the indictment, or in matters of fact not so apparent, but when shown on plea making the indictment defective; but there are instances of the withdrawal of the plea of not guilty being allowed as a matter of favour after being recorded but before any evidence given, and a plea to the jurisdiction admitted (*s*). Pleas in abatement are, however, now rendered partially useless by 7 Geo. 4, c. 64, s. 19, by which Act, for preventing abuses from dilatory pleas, it is enacted, that “no indictment or information shall be abated by reason of any dilatory plea of misnomer, or of want of addition, or of wrong addition of the party offering such plea, if the court shall be satisfied by affidavit or otherwise of the truth of such plea; but in such case the court shall forthwith cause the indictment or information to be amended according to the truth, and shall call upon such party to plead thereto, and shall proceed as if no such dilatory plea had been pleaded.” And these pleas are rendered nugatory in respect of formal defects apparent on the face of the indictment by 14 & 15 Vict. c. 100, s. 25, by which statute “every objection to any indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment before the jury shall be sworn, and not afterwards;

Of pleas in
abatement.

Amendment
of indictment.

(*r*) 2 Hale, 175; Fost. 16; 1 Lea. 476.

(*s*) *Kinloch's case* (1746), Fost. 16; *R. v. Purchase* (1842), C. & M. 617.

Defective
indictment
cured.

and every court before which such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared." And by 14 & 15 Vict. c. 100, s. 24, "no indictment shall be held insufficient for want of the averment of any matter unnecessary to be proved, nor for the omission of the words 'as appears by the record,' or of the words 'with force and arms,' or of the words 'against the peace,' nor for the insertion of the words 'against the form of the statute' instead of 'against the form of the statutes,' or *vice versâ*; nor for that any person mentioned in the indictment is designated by a name of office or other descriptive appellation instead of his proper name, nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequently to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper venue, nor for want of a proper or formal conclusion, nor for want of or imperfection in the addition of any defendant, nor for the want of the statement of the value or price of any matter or thing, or the amount of damage, injury or spoil in any case where the value in price or the amount of damage, injury or spoil is not of the essence of the offence."

There would seem, however, to be one case at least in which a plea in abatement is the proper, and indeed the only way to take advantage of an objection to a want of certainty and definiteness which is not apparent on the face of the indictment, but appears on matters of fact *dehors* the indictment; thus, if the description of a highway in an indictment for its non-repair be equally applicable to several highways, the defendant might plead in abatement that there were several such highways, all answering to and known by the description used in the indictment, and then proceed to give a more definite and particular description of them (*t*).

Of pleas to the
jurisdiction.

Pleas to the jurisdiction are scarcely ever necessary in inferior courts of a limited local jurisdiction, within whose jurisdiction nothing shall be intended to be which is not alleged or proved to be so (*u*). Therefore, if an indictment is found and tried at quarter sessions for an offence over which the sessions has no cognizance, though the defendant may plead to the jurisdiction without answering the charge at all (*x*), yet, inasmuch as it would appear to be the subject of

(*t*) *R. v. Hammersmith* (1816), 1 Stark. N. P. 357; Burn's Justice, 20th ed. vol. 1, p. 2.

(*u*) *Peacock v. Bell* (1666), 1 Saund. 69; *R. v. Johnson* (1805), 6 East, 583.

(*x*) 2 Hale, 236.

a demurrer, either upon the face of the indictment or upon the caption of the record (*y*), or may be taken advantage of on the plea of general issue, it is thought unnecessary to say more about them here.

Of special pleas in bar, the plea of *autrefois acquit* shall be first considered. As to the form of the plea, by 14 & 15 Vict. c. 100, s. 28, in any plea of *autrefois acquit* it shall be sufficient for any defendant to state that he has been lawfully acquitted of the said offence charged in the indictment.

Special pleas
in bar.
*Autrefois
acquit.*

This plea is based on the principle that a man ought not to be placed in jeopardy twice in respect of the same offence (*z*). Therefore, it must appear that the prisoner could have been lawfully convicted upon any evidence that might have been adduced on the trial of the first indictment for the offence charged in the second (*a*); and a criterion is, whether the evidence necessary to support the second indictment would have been sufficient to have procured a conviction on the first (*b*).

Judgment in favour of a prisoner on a demurrer to an indictment is not pleadable in bar to a subsequent indictment (*c*), for the indictment on the first trial must have been such that judgment was or might have been lawfully passed upon the prisoner (*d*). So a person cannot plead his acquittal on a prior indictment where, by reason of some defect or insufficiency in the record, either in the indictment, place of trial, process or the like, the judgment has been reversed on writ of error, for in such a case he was not lawfully liable to suffer judgment for the offence charged on that proceeding, and a judgment reversed on error being the same as no judgment (*e*).

So the acquittal must be by judgment upon a verdict of the jury after trial, and therefore the ignoring of a bill by the grand jury, or the failure to present a bill after a committal, and a consequent discharge of the prisoner by proclamation, does not support this plea (*f*).

An abortive trial without verdict cannot be pleaded as an acquittal: thus, if after the jury are sworn and the prisoner given in charge to them, the judge, in order to prevent a failure of justice by the refusal of a witness to give his evidence, or by reason of the non-agreement of the jury to a verdict, or by reason of the death or such illness of a jurymen

(*y*) *R. v. Fearnley* (1786), 1 T. R. 316.

(*z*) 1 Chit. Cr. L. 452; 4 Co. 40; 3 Inst. 213.

(*a*) *R. v. Bird* (1851), 20 L. J. M. C. 70; *R. v. Sheen* (1827), 2 C. & P. 634; *R. v. Clark* (1820), 1 Brod. & B. 473.

(*b*) *R. v. Bird, ubi sup.* See *R. v. Emden* (1808), 9 East, 437.

(*c*) *R. v. Richmond* (1821), 1 C. & K. 240.

(*d*) *Vaux's case* (1589), 2 Co., pt. 4, 44 a, p. 400.

(*e*) *R. v. Drury* (1849), 3 C. & K. 193; *Vaux's case, ubi sup.*

(*f*) 2 Hale, 243, 246; 2 Hawk. c. 35, s. 6.

as to necessitate the discharge of the jury before verdict, does so discharge them without coming to a verdict (*g*).

The effect of the 14 & 15 Vict. c. 100, s. 28, is now to render the identity of the offences charged a matter of evidence and a question for the jury, but the powers of amendment given by statute for the support of indictments do not put the prisoner in jeopardy upon an insufficient indictment, as, for instance, where the property of goods stolen is laid in the wrong person, though such powers of amendment might be exercised, yet, if in fact they have not been, and if a prisoner be acquitted on such an indictment for larceny, because it was not amended, he cannot plead *autrefois acquit* to a subsequent indictment against him for stealing the same goods, laying the property in the right person (*h*).

Where local description essential to the offence.

Where local description is essential to the offence, a variance between the two indictments will render the plea of *autrefois acquit* ineffectual (*i*).

An acquittal upon an indictment for burglary and larceny of goods operates as an acquittal for larceny of the same goods, but an acquittal on an indictment charging burglary with intent to commit larceny, and not charging actual larceny, does not operate as an acquittal for the larceny of the same goods, nor, *e converso*, would an indictment for burglary and larceny operate as an acquittal for burglary with intent to commit a larceny (*k*); but if a burglary and larceny of certain goods is charged in the indictment, an acquittal on that charge would operate as an acquittal of an attempt to steal the same goods by force of 14 & 15 Vict. c. 100, s. 9, but not of an attempt to steal other goods (*l*).

An acquittal upon an indictment for embezzlement or fraudulent application or disposition of property within 24 & 25 Vict. c. 96, operates as an acquittal for simple larceny or larceny as a clerk or servant, or as a person employed in the public service, or in the police. So an acquittal upon an indictment for larceny operates as an acquittal of embezzlement, fraudulent application, or disposition of the same property (*m*).

At common law an acquittal upon an indictment for felony is no bar to an indictment for a misdemeanour upon the same facts, and *e converso* (*n*); but by force of statute an acquittal

(*g*) *R. v. Winsor* (1866), L. R. 1 Q. B. 289, 390; *R. v. Charlesworth* (1861), 31 L. J. M. C. 25; *Conway v. Lynch* (1845), 7 Ir. Law R. 149, per Crampton, J.

(*h*) *R. v. Green* (1856), 26 L. J. M. C. 17.

(*i*) 2 Hale, 245.

(*k*) *Vandercomb's case* (1796), 2 Lea. 708. The report of this case sets out the pleadings, which were—Plea of *autrefois acquit*—Demurrer thereto, and joinder in demurrer.

(*l*) *R. v. McPherson* (1857), 26 L. J. M. C. 134.

(*m*) 24 & 25 Vict. c. 96, s. 72.

(*n*) See 2 Hawk. c. 35, s. 5. And see *R. v. Bird* (1851), 20 L. J. M. C. 70.

upon an indictment for the misdemeanour of obtaining money by false pretences, is to operate as an acquittal for larceny upon the same facts (*o*); and by the force of another statute an acquittal by the verdict of a jury on the trial of a misdemeanour, which appeared on the facts given in evidence to amount to a felony, shall operate as an acquittal for a felony subsequently charged upon the same facts (*p*).

An acquittal as accessory is a bar to an indictment as principal for the same offence by virtue of 24 & 25 Vict. c. 91, s. 7.

The original indictment on which the first trial was had is evidence on this plea during the continuance of the same sessions, without a record having been drawn up (*q*). After a trial for rape, and an acquittal thereon, another indictment for rape on the same person was found at the same assizes, and upon this plea being pleaded to such second indictment, the prisoners' counsel began, and put in evidence the commitment and first indictment, with the minutes of the former acquittal as written over the prisoners' names, without drawing up a record; and after a verdict of the jury that the offences were the same, it was held that the evidence was properly admitted, and was alone sufficient to justify the verdict (*r*).

Evidence to support the plea.

By 14 & 15 Vict. c. 100, s. 13, whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof; but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof.

This plea ought, properly, to be on parchment, signed by counsel (*s*); but the plea will not be rejected by the court because it is informal, but it will assign counsel to prepare it in a proper form for the defendant (*t*). In *R. v. Walker* (*u*), the plea was tendered *ore tenus*, but Parke, B., ordered it to be put on parchment; a demurrer to it was subsequently

Should be on parchment—should be signed.

(*o*) 24 & 25 Vict. c. 96, s. 88.

(*p*) 14 & 15 Vict. c. 100, s. 12.

(*q*) *R. v. Horne Tooke* (1794), 25 St. Tr., acted on in *R. v. Parry* (1837), 7 C. & P. 839.

(*r*) *R. v. Parry*, *sup.*

(*s*) *R. v. Sheen* (1827), 2 C. & P. 634. See report for precedents of plea of *autrefois acquit* and replication.

(*t*) *R. v. Chamberlain* (1833), 6 C. & P. 93.

(*u*) (1843), 2 Moo. & R. 446.

tendered by the Crown *ore tenus*, but the judge ordered that also to be put on parchment. Joinder in demurrer was, however, allowed *ore tenus*, on the authority of *R. v. Sheen* (x). An amendment of the plea has been also allowed after it had been put in on parchment, and time given to the Crown to decide upon whether the prosecution would demur or traverse (y).

The plea, if to a felony, should conclude with pleading over to the felony (z), but this is not absolutely necessary (a).

Plea of certificate of dismissal upon complaint before justices for assault.

A certificate of the dismissal of a complaint by justices for a common assault, or for an assault upon a male child of fourteen years or under, or upon any female of an aggravated nature, operates as a release from an indictment, &c. for the same cause (b). Such a certificate is pleadable as a bar to an indictment charging a malicious and unlawful wounding, for an assault occasioning actual bodily harm upon the same facts (c); or to an indictment for felonious stabbing with intent (d), or for an assault and carnally knowing and abusing a girl between the age of ten and twelve years (e), or for rape (f); but such certificate would not be pleadable in bar of an indictment for manslaughter or murder upon the death of the person assaulted, inasmuch as it is not a proceeding for the same cause as a complaint before the justices for the assaults which caused the death made by the party subsequently deceased in his lifetime (g).

A certificate of dismissal must always be specially pleaded in the same manner as a plea of *autrefois acquit* (h), and the certificate of dismissal should be set out in the plea (i), if it is intended to be set up as an answer in bar.

Form of Plea of *Autrefois Acquit*.

Form of plea. And the said in his own proper person comes into court here, and having heard the said indictment read, says, that our said lord the

(x) *R. v. Sheen* (1827), 2 C. & P. 634.

(y) *R. v. Sheen*, *sup.*

(z) *R. v. Drury* (1849), 3 C. & K. 193, 200.

(a) *R. v. Sheen*, *ubi sup.*; 2 Hawk. c. 23, s. 128; *R. v. Welch* (1828), Car. Cr. L. 56, Q. B.

(b) 24 & 25 Vict. c. 100, ss. 42, 43, 44, 45.

(c) *R. v. Elrington* (1861), 31 L. J. M. C. 14; *R. v. Taylor* (1869), L. R. 1 C. C. R. 194; *R. v. Oliver* (1860), 30 L. J. M. C. 12; *R. v. Yeadon* (1861), 31 L. J. M. C. 70.

(d) *R. v. Walker* (1843), 2 Moo. & R. 446. Blackburn, J., in *R. v. Elrington*, *sup.*

(e) *R. v. Guthrie* (1870), L. R. 1 C. C. R. 241.

(f) *Re Thompson* (1860), 30 L. J. M. C. 19; *Wilkinson v. Dutton* (1863), 32 L. J. M. C. 152.

(g) *R. v. Morris* (1867), L. R. 1 C. C. R. 90.

(h) *Harding v. King* (1834), 6 C. & P. 427; *R. v. Walker*, *sup.*

(i) *Skuse v. Davis* (1839), 10 A. & E. 635, which see as to form and essentials of plea of previous acquittal or conviction by justices.

King ought not further to prosecute the said indictment against the said C. D., because he says that heretofore, to wit, on the day of , at the general quarter sessions of the peace holden at in and for the county of , he the said C. D. was lawfully acquitted of the said offence charged in the said indictment. And this he the said C. D. is ready to verify. Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified. And as to the felony and larceny of which he the said C. D. now stands indicted, he the said C. D. says that he is not guilty thereof, and of this the said C. D. puts himself upon the country, &c.

Replication to Plea.

And hereupon A. B. [the clerk of the peace], who prosecutes for our said lord the King in this behalf, says, that by reason of anything in the said plea of the said C. D. above pleaded in bar as alleged, our said lord the King ought not to be precluded from prosecuting the said indictment against the said C. D.; because he says that the said C. D. was not lawfully acquitted of the said charges in the said indictment in manner and form as by the said C. D. in the said plea is alleged: and this he the said A. B. prays may be inquired of by the country. And the said C. D. doth the like. Therefore let a jury come, &c.

Form of replication to plea *autrefois acquit*.

Form of Plea of Certificate of Dismissal of Complaint.

C. D. } And the said C. D. comes into court here, and having heard the
against } said indictment read, says, that our lord the King ought not
R. } further to prosecute the said indictment, because he says that
heretofore, to wit, on at , in the county of , he the said
C. D. was upon a certain complaint made by the said A. B. in the indictment mentioned, for that [*reciting complaint in past tense*] before
and , being two justices of peace acting in and for the said county,
he the said A. B. then and there being the party aggrieved in that behalf,
brought before the said and , then and there so being two
of such justices of the peace in and for the said county, charged by the
said complainant, for that he the said C. D. did on, &c., at &c., in the
said county, unlawfully assault and beat the said A. B. contrary to, &c.,
and the said two justices proceeded to hear and heard what the said A. B.
had to allege in that behalf, and the evidence adduced by him in support
of the said charge, and also heard what the said C. D. then and there
alleged in his defence, and the said justices then and there adjudged that
the said offence was not proved [*or that the said C. D. was lawfully
justified in committing the said assault and battery, or that the said
assault and battery were so trifling as not to merit punishment, as the case
may be*], and thereupon the said justices accordingly on the ground aforesaid
dismissed the said complaint, and forthwith made out their certificate
under their hands stating the fact of such dismissal upon the grounds
aforesaid, and delivered the same certificate to the defendant, which said
judgment and dismissal still remain in full force and effect, and the
defendant says that the said assault, &c., in respect whereof the said
A. B. had so complained as aforesaid before the said justices against him
the defendant, and in respect of which the said justices had so adjudicated
and granted the said certificate, was and is the same identical assault, &c.
mentioned and charged against him the said C. D. in the said indictment,
and the said indictment and the said complaint are proceedings in respect
of one and the same cause, and not other or different. And this the said
C. D. is ready to verify. Wherefore he prays judgment that by the
court here he may be dismissed and discharged from the premises in the
said indictment specified. And as to the felony aforesaid in the said
indictment mentioned the said C. D. says that he is not guilty thereof,
and therefore he puts himself upon the country.

Form of plea of certificate of dismissal of complaint.

Plea of *autrefois convict*.

We have next to consider pleas of *autrefois convict*.

A man who has been convicted of an indictable offence may plead such conviction in bar of a subsequent indictment for the same offence of which he was convicted (*k*).

Since the 14 & 15 Vict. c. 100, s. 28, in any plea of *autrefois convict* it shall be sufficient for any defendant to state that he has been lawfully convicted of the said offence charged in the indictment. Prior to the year in which that Act passed it had been necessary to set out the record of the conviction. Now neither need the record be set out in the indictment nor even given in evidence, as a certified copy of the record of the indictment, trial, conviction and judgment, omitting the formal parts thereof, is now sufficient (*l*).

The judgment for the defendant is that he be dismissed or discharged from the premises.

Judgment for the Crown, on the issue being found against the defendant, in cases of felony, is that he answer over (*m*); but in cases of misdemeanour it is final for the Crown.

Plea of previous summary conviction of same assault.

There is also a plea of the same nature which sets up as a bar to an indictment for an assault, or an offence including an assault, a previous summary conviction before justices for the same assault on a complaint by the person assaulted, under the 24 & 25 Vict. c. 100, s. 42, *et seq.* The cases cited *ante*, p. 211, to show wherein an adjudication of dismissal is or is not a bar, equally apply to show when a conviction is or is not a bar.

If upon the complaint for the assault before the justices, instead of a conviction with fine or imprisonment or a dismissal, the justices merely order the defendant to enter into recognizances to keep the peace and pay the costs, no conviction being drawn up, such circumstances cannot be pleaded in bar of the subsequent indictment (*n*), but may be taken into consideration by the court before passing sentence.

Form of Plea.

Form of plea of *autrefois convict*.

And the said C. D. in his own proper person comes into court here, and having heard the said indictment read, says, that our said lord the King ought not further to prosecute the said indictment against the said C. D., because he says that heretofore, to wit, on the day of , A.D. , at the general quarter sessions of the peace holden at in and

(*k*) 2 Hale, P. C. 251; *Taux's case* (1589), 2 Co., pt. 4, 41 a, 400; 2 Hawk. c. 36, ss. 10, 14.

(*l*) 14 & 15 Vict. c. 99, s. 13. See *ante*, p. 213, where this section is set out.

(*m*) *R. v. Taylor* (1824), 3 B. & C. 513. The distinction between felonies and misdemeanours, in this respect, was established *in favorem vite*, and, except in the few capital felonies still remaining, the reason for the distinction has long since disappeared. The rule, however, remains.

(*n*) *Hartley v. Hindmarsh* (1866), L. R. 1 C. P. 553.

for the county of _____, he the said C. D. was lawfully convicted of the said offence charged in the said indictment, which said conviction still remains of full effect and unrevoked. And this he the said C. D. is ready to verify. Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified.

Form of Plea of Summary Conviction for an Assault before Justices.

C. D. } And the said C. D. in his own proper person comes into court against } here, and having heard the said indictment read, says, that R. } our said lord the King ought not further to prosecute the said indictment against him the said C. D. in respect of the offence in the said indictment mentioned, because he says that heretofore, to wit, on the day of _____, in the year of our Lord _____, at the parish of _____, in the county of _____, he the said C. D. was upon the complaint of the said A. B., then and there being the party aggrieved in that behalf [reciting the complaint in the past tense], convicted before the said E. F., Esq., and G. H., Esq., so being such two of his Majesty's justices of peace in and for the said county, for that the said C. D. did on, &c., at, &c., in the said county unlawfully assault and beat the said A. B. in the peace of our said lord the King then and there being contrary to the statute in that case made and provided; and the said justices did then and there adjudge the said C. D. for this said offence to forfeit and pay the sum of 5<i>l.</i> of lawful money of Great Britain to be paid and applied according to law, and also to pay to the said A. B. the sum of 5<i>l.</i> for his costs, and in default of immediate payment of the said several sums by the said C. D. to be imprisoned in the house of correction for the said county for the space of two calendar months, unless the said several sums should be sooner paid, as by the record of the said conviction more fully and at large appears, which said judgment and conviction still remains in full force and effect, and not in the least reversed or made void. And the said C. D. further says, that the assault and battery of the said A. B., of which he the said C. D. was convicted as aforesaid, and the wounding of the said A. B., in the said indictment mentioned, are one and the same assault and battery, and not other and different. And he the said C. D. further says, that he the said C. D. has duly paid the whole amount of the said several sums so adjudged by the said justices to be paid under the said conviction as aforesaid, in manner and form as by law required. And this he the said C. D. is ready to verify. Wherefore he prays judg- ment if our said lord the King ought further to prosecute the said indict- ment against him the said C. D. in respect of the said offence in the said indictment mentioned, and that he the said C. D. may be dismissed and discharged from the same. And as to the felony aforesaid, in the said indictment mentioned, the said C. D. says that he is not guilty thereof, and therefore he puts himself upon the country, &c.	Form of plea of previous summary con- viction for same assault.
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Replication to Plea of previous Conviction.

And hereupon A. B. (clerk of the peace), who prosecutes for our said lord the King, in this behalf says, that by reason of anything in the said plea of the said C. D. above pleaded in bar alleged, our said lord the King ought not to be precluded from prosecuting the said indictment against the said C. D., because he says that there is not any record of the said supposed conviction in manner and form as the said C. D. hath above in his said plea alleged; and this he the said A. B. prays may be inquired of by the country, &c., and the said C. D. doth the like. Therefore let a jury come, &c.	Form of repli- cation to plea.
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SECTION 8.

PLEA OF GUILTY OR NOT GUILTY, AND REFUSING TO PLEAD.

Plea of guilty.

If after the reading of the indictment, and upon the prisoner being called upon to plead, as stated *ante*, p. 206, the prisoner pleads "Guilty," the court may immediately record the plea, and either proceed immediately to give judgment, or examine witnesses as to the circumstances of the offence, for the guidance of their own discretion in determining on the sentence. But it is usual for the officer to explain to the prisoner the consequences of his plea, and to ask him again whether he persists in it; and there has been a prevalent practice among judges of assize of doing far more than this—of entreating the prisoner to withdraw his plea, admonishing him of his right to a trial, and manifesting much reluctance to receive his open confession of guilt. How far this practice shall be adopted at sessions must be left to the good sense of the chairman, who may, however, deem it quite sufficient to have ascertained that the prisoner fully understood the meaning and effect of his plea, and that he had made up his mind so to plead. After sentence has passed, the prisoner cannot retract his plea of guilty.

Prisoner standing mute of malice.

By 7 & 8 Geo. 4, c. 28, s. 2, it is enacted, "that if any person arraigned upon or charged with any indictment or information for treason, felony, piracy or misdemeanour, shall stand mute of malice, or shall not answer directly to the indictment or information, in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of '*not guilty*' on behalf of such person; and the plea so entered shall have the same force and effect as if such person had actually pleaded the same."

Where prisoner is dumb.

The course of proceeding where a prisoner, on being arraigned, says he is deaf, and does not appear to hear the indictment when read to him (*o*), or stands mute (*p*), is in the latter case, when the prisoner is dumb, for instance, to endeavour, by means of an interpreter (*q*) and by his signs,

(*o*) *R. v. Halton* (1824), 1 R. & M. N. P. 78; see *R. v. Pritchard* (1836), 7 C., & P. 303; *R. v. Dyson* (1831), *ibid.* 305, n.

(*p*) *R. v. Mercier* (1777), 1 Lea. 183.

(*q*) The form of oath to be administered to an interpreter may be as follows:—

"You swear that you will well and truly interpret and make known to the prisoner at the bar, by such signs, ways, and methods as shall be best known to you, the indictment wherewith he stands charged; and also all such matters and things as the court shall require to make known to him; and also well and truly to interpret to the court the plea of the said prisoner to the said indictment, and all answers of the said prisoner to the said matters and things so required and made known to him [and also the evidence which the said prisoner shall give on his own behalf, if he

to make the prisoner understand and plead through the interpreter; but if the court is not successful in this, then to impanel a jury (*e.g.*, that impanelled for trial of prisoners) to try whether he stands mute by the visitation of God, or through wilfulness and obstinacy (*r*). His counsel may address the jury and call witnesses, for the affirmative of the issue is on him (*s*). If a prisoner is found mute by the visitation of God, a plea of not guilty may be entered; and the case should be heard with careful vigilance on the part of the court, to give the prisoner the benefit of everything which may appear in his favour (*t*). Great diligence and circumspection should, of course, be exercised in so critical a case. And where the visitation has not supervened on the instant, but the party is *surdus et mutus à nativitate*, any assistance to be obtained from signs or tokens which he has been made to understand, and has acted on by returning communication to them, should be sought for and obtained; even, as it seems, at the expense of remanding the prisoner and respiting the recognizances to the next session (*u*). Where a party refused to plead, on the ground that he had before pleaded to another indictment for the same offence, but which was not valid, a plea of not guilty was entered under 7 & 8 Geo. 4, c. 28, s. 1 (*x*).

Entering plea
of not guilty
by the courts.

When a prisoner pleads "not guilty," he is by such plea, without any further form, deemed to have put himself on the country for trial, and the court in the usual manner orders a jury for his trial accordingly (*y*). The clerk of the peace, however, still records the plea, by writing the word—"po se," for "*ponit se super patriam*," on the parchment record of the proceedings of the session (*z*).

Plea of not
guilty.

Should any violence or fear of rescue or escape have occasioned the prisoner to be handcuffed, the court has, after the jury have been charged to try him, power to order his hand-

shall elect to give evidence, and the answers which he shall give to all such questions as shall be put to him when in the witness-box, whether in examination in chief or cross-examination, or in re-examination or by the court], according to the best of your skill and understanding. So help you God." This form is taken, except as to the words in brackets, from *R. v. Dyson* (1831), 7 C. & P. 305. The words within brackets are suggested as appropriate to meet the present state of the law.

(*v*) *R. v. Mercier* (1777), 1 Lea. 183; *R. v. Steel* (1787), 1 Lea. 453.

(*s*) *R. v. Roberts* (1816), Carr. Cr. L. 57.

(*t*) *R. v. Steel, sup.*; *R. v. Halton, sup.* The oath to the jury to try a mute is, "You shall well and truly try the prisoner at the bar, whether he stands mute by the act of God or out of malice, and a true verdict thereupon give according to the evidence. So help you God." Cro. Car. Comp. 542.

(*u*) See *R. v. Steel*, and *R. v. Jones* (1773), 1 Lea. 452, note.

(*x*) *R. v. Bitton* (1833), 6 C. & P. 92.

(*y*) 7 & 8 Geo. 4, c. 28, s. 1.

(*z*) For the practice at the Central Criminal Court, which is somewhat different, see *R. v. Newman* (1852), 2 Den. C. C. 392.

As to withdrawal of a plea.

cuffs to be struck off, which, it would appear, the court has no power to do before the jury have been so charged (*a*).

After a plea has been once pleaded, the permission to withdraw the plea is a matter in the discretion of the chairman or recorder at the trial, and has been granted in some cases and refused in others, by a judge to a prisoner who had pleaded not guilty, when the application to withdraw the plea was made with a view to demurring to a portion of the indictment (*b*); the withdrawal of the plea ought to be allowed wherever such withdrawal will effect substantial justice, but ought not to be allowed merely to enable a prisoner to raise a technical objection (*c*). A prisoner, after having pleaded not guilty to a forgery, has been allowed to withdraw his plea, and plead guilty; and again, upon being called as a witness against an accomplice, and swearing that his plea of guilty was pleaded by mistake, to withdraw his second plea and again plead not guilty, and be tried upon it (*d*). In *Kinloch's case* (*e*) the prisoners, after having pleaded not guilty to the indictment, and after the jury were sworn and they were given in charge, but before any evidence for the Crown was given, were permitted by the court, in the apprehension that an objection which they had to the jurisdiction of the court could not be taken advantage of upon the general issue, to withdraw their plea and plead specially to the jurisdiction; and, to enable this to be done, a juror by consent was withdrawn, and the jury discharged from giving their verdict on the plea then pleaded; and afterwards, on judgment being given against the defendants on the special plea, they were again arraigned, and the same jury were again sworn and charged and gave their verdict, which was upheld. The exercise of the above discretion by the court cannot be reviewed on a case reserved (*f*).

Defendant must plead in person.

The defendant must plead in person, for at *quarter sessions* he cannot appear by attorney (*g*), though a trial for misdemeanour may, after plea, proceed to conviction and sentence in the absence of the defendant (*h*). If he is present, it is not

(*a*) *R. v. Laver* (1722), 16 How. St. Tr. 94, 99, 129; *R. v. Waite* (1743), 2 East, P. C. 570.

(*b*) *R. v. Brown* (1848), 17 L. J. M. C. 145; *R. v. Binckes* (1805), 2 Smith, 620.

(*c*) *Brown's case* (1848), 1 Den. C. C. 293, n.

(*d*) *R. v. Clouter* (1859), 8 Cox, C. C. 237.

(*e*) (1746), Fost. 16.

(*f*) *R. v. Brown, sup.*

(*g*) *R. v. Birmingham and Gloucester Ry. Co.* (1842), 3 Q. B. 223, *per curiam*.

(*h*) 2 Chit. Cr. L. 413, 2nd ed.; he may be fined in his absence, but to mitigate a fine he must appear in person: 2 Hawk. c. 48, s. 22. So on moving for a new trial: *R. v. Hollingberry and others* (1825), 4 B. & C. 329.

essential that he should be tried *at the bar*, i.e., in the dock, but it is otherwise in felony (*i*).

When trial may be in the absence of the accused.

SECTION 9.

OF POSTPONING TRIAL.

The presenting a bill for even a capital offence may be postponed on affidavit of the attorney for the prosecution, that a material and necessary witness is ill, though he has been examined before a magistrate, and his deposition contains no matter to show his evidence to be essential, for material evidence may have been discovered since; nor need the affidavit state that evidence.

Postponing bill.

If after indictment found, and not guilty pleaded, the prosecutor do not appear, the prosecutor is (by the crier) called to come and give evidence, and on his default to appear, the chairman addresses the jury to this effect,—“Gentlemen, A. B. stands indicted for making an assault upon Y. Z. [*or as the misdemeanour may be*]; no one appears to prove that he is guilty, and therefore you must acquit him;” and thereupon the jury being asked (*by the clerk of the peace*) “whether the defendant is guilty or not guilty,” say, “*Not guilty.*”

Prosecutor not appearing.

If the prosecutor does not appear, the court may, upon motion on behalf of the defendant being in custody, order the defendant’s recognizances to be discharged, and himself discharged by proclamation at the end of the sessions (*k*), or, if an *acquittal* is desired, to respite the recognizances, and to put off the trial to the next session; making an order, at the same time, that notice shall be deemed well served if left at the last place of the prosecutor’s abode, or at the office of the clerk of the peace, with certain conditions of publication or notification, as to the said court shall seem necessary. These terms, imposed by the court, whatever they may be, having been complied with, the defendant, in order to an *acquittal* at the next sessions, should be prepared with affidavits of the order, and of the acts done in conformity with it, to be produced at the ensuing session; when, if the prosecutor again fail to appear, the jury will be sworn, and an *acquittal* directed.

The court has the power to postpone a trial *suo motu*, but a trial may also be put off on motion made by either party, after plea pleaded (*l*).

Postponement may be by court itself or at the instance of either party.

(*i*) See *ante*, p. 197.

(*k*) See *R. v. Hibbard* (1844), 1 C. & K. 461.

(*l*) *R. v. Bolam* (1839), 2 M. & Rob. 192; *R. v. Doyle* (1788), 1 Esp. N. P. C. 125; *R. v. Fitzgerald* (1843), 1 C. & K. 201, in which case trial

Traverses
abolished.

Right of
accused to
postponement
abolished,
but, on appli-
cation of
accused,
court may
order post-
ponement.

As to prose-
cutions for
non-repair of
bridges or
highways.

Before the 60 Geo. 3 & 1 Geo. 4, c. 4 (*rep.* 14 & 15 Vict. c. 100, s. 26), the defendant in misdemeanour had the right to postpone the trial till the next sessions by traversing the indictment, but by that Act that right was essentially narrowed; and now, by 14 & 15 Vict. c. 100, s. 27, it is enacted, that "no person prosecuted shall be entitled to traverse or postpone the trial of any indictment found against him at any session of the peace, session of oyer and terminer, or session of gaol delivery: provided always, that if the court upon the application of the person so indicted or otherwise shall be of opinion that he ought to be allowed a further time either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms as to bail or otherwise as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence at such subsequent sessions without entering into any fresh recognizance for that purpose: so that now all persons who are in custody, or are out on bail upon charges of misdemeanour, are, on the finding of the indictment, subject to postponement for cause, bound to plead and try *instantly*, like parties charged with felony. And where an indictment has been found at a former sessions, and the party has been afterwards taken, or bailed, he is bound at such session to plead and try, unless a writ of *certiorari* first remove the proceedings, or [*submitted*] unless a postponement of the trial be granted for good cause shown. The statute 14 & 15 Vict. c. 100, which abolished traverses, makes no exception in the case of prosecutions for non-repair of bridges or highways which were excepted from 60 Geo. 3 & 1 Geo. 4, c. 4, s. 10.

The grounds for putting off a trial of felony or misdemeanour are various; as the circulation of handbills tending to influence the minds of the jurors (*m*); the illness of the defendant's attorney in a case where the preparation for trial was handed over to the attorney (*n*); the ignorance of a material witness as to the nature and obligation of an oath (*o*); the panel of jurors having been taken from a

was postponed on the application of the prisoner, after he had been given in charge to the jury on an indictment for felony, *but before any evidence had been given.*

(*m*) *R. v. Jolliffe* (1791), 4 T. R. 285.

(*n*) *Hayley v. Grant* (1752), Say. R. 63; Bac. Abr. *Trial* (H).

(*o*) In this case, the court will order the witness to be instructed on these points before the next session. Rooke, J., took this course in the case of a child; and all the judges approved it: see *Murphy's case*, in 1795, in note to *R. v. White* (1786), 1 Lea. 430, note; and 2 Bac. Abr. (by Gwillim), tit. *Evidence*, 577, note; but without laying down any general rule, Pollock, C. B., declined to take this course: *R. v. Nicholas* (1846), 2 C. & K. 246. Special provision is made by sect. 15 of the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), for

neighbourhood so excited against the prisoner by various publications, as to prevent the likelihood of a fair trial (*p*); the prosecutrix having been bribed and kept out of the way to prevent her giving evidence (*q*), &c.

But the most usual ground is the absence of a material witness for the prosecution, or defence; whether occasioned by illness (*r*), being kept out of the way by the other side (*s*), or other circumstances (*t*). It should, however, be borne in mind, with reference to the postponement of a trial on the ground of the absence through illness of a material witness, that if such witness has been examined before a committing magistrate, if the cause of absence is sufficient to satisfy the 11 & 12 Vict. c. 42, the deposition of the witness may be read in evidence (*u*). Inasmuch as the granting this delay at the instance of the accused, though expedient to justice, is an indulgence, and not a right, laches by him in endeavouring to serve a subpoena, or to procure the attendance of the absent witness, may be fatal to his application (*v*). The affidavit on which the motion is founded should regularly be sworn at

Affidavit of grounds.

the reception of the evidence not on oath of the child in respect of whom the offence is alleged to have been committed, or of any other child of tender years who is tendered as a witness, who does not, in the opinion of the court, understand the nature of an oath, if in the opinion of the court such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

Evidence of children not on oath.

Similar provision is made by sect. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), in the case of offences against children under that section, but such offences are not triable at quarter sessions.

(*p*) *R. v. Bolam* (1839), 2 M. & Rob. 192.

(*q*) *R. v. Gutteridge* (1840), 9 C. & P. 223.

(*r*) It is in the discretion of a judge to postpone the trial, though the depositions of the witness have been taken and are admissible in evidence, under 11 & 12 Vict. c. 42, s. 17, or 30 & 31 Vict. c. 35, and though the application be on the part of the prosecution, the recognizances of prosecutor and witnesses being enlarged: *R. v. Tait* (1861), 2 F. & F. 553.

(*s*) *R. v. Gutteridge*, *sup.*; also *Green v. Gatewick* (1671), Bull. N. P. 243.

(*t*) *R. v. Owen* (1839), 9 C. & P. 83. After the grand jury was discharged, the prisoners were acquitted of the rape of Christina Collins. One Orgill, being on his trial for bigamy before the other judge at the time the trial for rape was proceeding, was convicted and sentenced to imprisonment; he then disclosed to the gaoler matters which Owen had told him in their cell respecting the death of C. C. Williams, J., remanded Owen and the other prisoners till the next assizes. In *R. v. Savage* (1843), 1 C. & K. 75, it was held to be sufficient that a material witness was the mother of an unweaned child, who could neither be brought to the assize town nor separated from its mother without danger to its life.

(*u*) As to when such depositions are admissible, see *post*, p. 295.

(*v*) If laches appears, the court will sometimes, in misdemeanours, impose terms on the accused, *e.g.*, to consent to examine a witness for the Crown on interrogatories, he being about to leave the country: *R. v. Morphey* (1814), 2 M. & S. 602. In such a case the defendant's written consent should be filed, verified by affidavit if not signed in the presence of the court.

least two days before the intended trial (*x*), unless the facts affecting the witness were not known till afterwards, when it may be sworn in court (*y*). The judge will decide from the depositions whether the witness is material or not; but if the witness was not examined before the magistrates or his deposition is not returned, affidavit must be made of what he is expected to prove (*z*).

On account of
the illness or
absence of a
witness.

The affidavit must, in general, be made by the party on whose behalf the postponement is sought; but his absence, age, sickness, or other sufficient cause, will let in his attorney, or even a third person, to swear it. The illness of the absent witness, or of a child of which she is the nursing mother, is best established by the affidavit of the medical attendant, such being deemed sufficient to prevent the estreat of his other recognizance. His name and place of abode, his continued absence, or actual incapacity to attend at any time during the session, and the use of every reasonable effort to compel such attendance, must be distinctly specified, and the materiality of his evidence in the case shown. Nor will these facts suffice to postpone the trial, unless the affidavit is *positive* in its verification of them. Thus, it must state that the absent party is a material witness, without whose evidence the applicant cannot safely proceed to trial, and that he has endeavoured, without effect, to serve him with a subpoena, specifying the exertions used. It should then state, in plain terms, that there is reasonable ground for believing that the delay sought for will tend to the furtherance of justice, and that the testimony of the witness may be obtained at the time to which the trial is proposed to be deferred.

The postponement of trial is seldom granted to a period later than to the next session (*a*). In one case of a misdemeanour respecting coin, standing for trial at an assize, the defendant was out on bail, and the judge, doubting whether the offence charged was indictable, put off the trial to the next assize by *consent*, in order to take the opinion of the judges in the interval (*b*); but since the 11 & 12 Vict. c. 78, and the establishment of the Court of Crown Cases Reserved, such a course in this particular instance is never likely to be taken again.

The trial will never be put off on account of the absence of witnesses to character (*c*). The prisoner will never be obliged to pay the costs of the prosecution where the trial of a felony is postponed on account of the illness of a witness for the

(*x*) See 1 Ch. Cr. L. 1st ed. 494.

(*y*) *R. v. Fitzgerald* (1843), 1 C. & K. 201.

(*z*) *R. v. Savage and Penn* (1843), 1 C. & K. 75.

(*a*) Bac. Abr. tit. *Trial* (H).

(*b*) *R. v. Heath* (1810), R. & Ry. 184.

(*c*) *Per* Lawrence, J., in *R. v. Jones* (1806), 8 East, 34.

prisoner (*d*); but if, after the trial of a misdemeanour is called on, the defendant procures the trial to be postponed, the prosecutor will be entitled to costs of the day (*e*). But where several indictments have been found against a prisoner or prisoners, and he or they have been tried and acquitted on some of them, the court will not postpone the trial of the others on the ground that the prosecutor had not had time to prepare the case properly for the instruction of counsel (*f*). In cases of felony, where the trial is postponed for any cause the prisoner will not be given any costs, but may be discharged on his own recognizance to appear at a future period (*g*); but after a bill has been found in serious cases, if the prisoner is in custody, the court may refuse to bail, though the postponement be at the instance of the prosecution (*h*).

More notice has been taken of this particular subject than it may appear entitled to receive; but this has been thought proper, because there is generally no part of the proceedings before courts of quarter session less critically attended to by the courts, or more carelessly executed by the professional attendants.

The following affidavits and notice will suggest like forms, varied according to the circumstances of each particular case.

THE KING ON THE PROSECUTION OF A. B. v. P. Q.

Joint Affidavit of a Defendant and his Attorney, made in order to postpone a Trial.

P. Q., the defendant above named, and X. Y. of _____, in the county of _____, attorney for the said P. Q., severally make oath and say. And Form of affidavit to postpone.

(*d*) *R. v. Hunter* (1829), 3 C. & P. 591.

(*e*) *R. v. Doyle* (1790), 1 Esp. 123.

(*f*) *R. v. Fuller* (1839), 9 C. & P. 35. In this case there were several indictments, but the evidence being contained in one set of depositions, the difficulty was to select and separate the different portions which were applicable to the various indictments. Counsel for the prosecution, after two of the indictments had been tried, and the prisoners had been acquitted, applied to postpone the trial of the remaining indictments till the next session, on the ground that the prosecutor had not had time to prepare the cases properly for the instruction of counsel; but Patteson, J., said: "If the application for postponement had been made previous to the prosecutor going before the grand jury, there would have been no doubt as to the propriety of granting it; and I will not say that it might not have been done after the bills had been found, and after the prisoners had been arraigned. But to decide that after prisoners have been tried upon two indictments and the evidence has failed, the other indictments against them may be postponed to another session, in my opinion would be very dangerous. My objection to it is that it is holding out a premium for the getting up of fresh evidence. It is inviting persons to come forward and give evidence which the prosecutor was not in possession of at the previous session."

(*g*) *R. v. Crowe* (1829), 4 C. & P. 251.

(*h*) *R. v. Gutteridge* (1840), 9 C. & P. 228; *R. v. Andrews* (1844), 2 D. & L. 10; *R. v. Owen* (1839), 9 C. & P. 83, 86.

first this deponent, the said P. Q., for himself saith, that one D. D. of , in the county of , seedsman, and one of the co-partners in the house of C. C., D. D. and Co. at aforesaid, in the county of aforesaid, he the said P. Q. is advised, and believes, is a material and necessary witness for him, this deponent, the said P. Q., and that he cannot safely proceed to the trial of the above indictment without his the said D. D.'s testimony. And this deponent, the said P. Q., further saith, that as soon as possible after he received notice of the aforesaid bill of indictment against him [or as soon after the order of committal to take his trial was made, *as the case may be*], he applied by letter to the said D. D., informing him that he the said P. Q. would require the attendance of him the said D. D. at the trial thereof, and requiring to be informed whether he the said D. D. was then in England, it being known to him, the said P. Q., that the said D. D. is frequently resident at Amsterdam, on account of the dealings and business of the said house of C. C., D. D. and Co. And this deponent further saith, that, in answer to his said letter, he was informed by the said C. C. that the said D. D. was at that time at Amsterdam aforesaid, and was not likely to return from thence before the end of the month of then next ensuing, which information the said deponent believes to be true. And the said deponent further saith, that he made another application by letter on the day of instant, addressed to the said C. C., inquiring whether the said D. D. was yet returned from Amsterdam, to which he, this deponent, received an answer so late as last, from the said C. C. informing him, this deponent, that the said D. D. was not yet returned, and that he was not expected to return till the end of the month of next, as before stated, which information this deponent does verily believe to be true. And this deponent, the said P. Q., further saith, that he fully expects to be able to procure the presence of the said D. D. at the next general quarter session of the peace, to be holden for this county of at , and the said D. D. will be then and there able and willing to attend the trial of the above-mentioned indictment. And this deponent, the said X. Y., for himself saith, that he is the attorney appointed by the said P. Q. to defend him on the trial of the said bill of indictment, on the prosecution of A. B., and that the said D. D. will be a material and necessary witness at the hearing of the same, and that without his testimony the said P. Q. cannot safely go to trial. And this deponent for himself further saith, that on the day of last past, he addressed a letter by the direction of the said P. Q. to the said D. D. at Amsterdam, requesting him to return, if possible, in order to be present at the trial of the before-mentioned indictment at the present session of the peace, and that he received an answer to the said letter from the said D. D. on the day of last, in which the said D. D. assured him, this deponent, that he could not possibly return to England till after the day of then next ensuing, but that he hoped to be able, and would be willing, to attend at the next general quarter session of the peace, to be holden at for the county of aforesaid. And this deponent, the said X. Y., further saith, that he has no doubt but the said D. D. will be ready and willing to attend at the next session of the peace as aforesaid, and that he verily believes that the interests of justice will be furthered by the postponement of the trial.

Sworn, &c.

Affidavit of Medical Attendant.

County of , } O. P. of in the said county, surgeon, maketh
to wit. } oath and saith, that M. N. of , carpenter, about
ten days since fractured his skull in a dangerous manner, and is still confined to his bed on account of the same, and is utterly incapable of being removed from his said bed without imminent danger to his life.

Sworn, &c.

THE KING ON THE PROSECUTION OF A. B. v. P. Q.

Notice of Application to postpone the Trial.

Mr. A. B. take notice, that I shall, on the day of instant, Notice of
at the sitting of the court of quarter session at for the county of application to
, or as soon after as counsel can be heard, move the said court that postpone.
the trial of the said indictment may stand over till the next general
quarter session of the peace for the said county, on account of the
absence of a material witness for the defendant in the same, who is
absent in foreign parts, and whom I have not been able to serve with a
subpcena.

X. Y.

Attorney to the defendant in the said prosecution.

To Mr. A. B., Prosecutor, &c.

(or to his attorney.)

The postponement of a trial may emanate from the court, Postponement
independently of the desire of the parties prosecuting or in order that
defending. Thus, when the power, now abolished, of all the de-
traversing indictments for misdemeanour existed, if several fendants may
were in custody for a conspiracy or other joint misdemeanour, be tried
and bills had been found, and one or more of them pre- together.
ferred to take their trial immediately, and the others to
traverse with their pledges according to the regular form,
the court would put off the trial till the period when, by the
customary expiration of the traverse, all the parties could be
tried together. This seemed to be the established practice,
and the reason given for it is, that were it otherwise, as there
is generally a difference in the guilt of the different offenders,
or in the evidence which is to attach guilt to them, those who
have the best chance of being acquitted would always offer
themselves for immediate trial, in order that they might
afterwards become witnesses for their confederates on the
trial of *their* traverses (*i*). On the point of *expediency* there
may be force in this reasoning; but at the same time it
appears to be a great hardship to keep a person in prison
without trial, who is willing to be tried, because another, who
is more fortunate, has been able to procure bail.

By analogy to the old practice upon traversing where a Proceedings
party seeks a postponement, he should appear in court with upon post-
sureties, in case he should be required to find bail. He can ponement.
then give to the clerk of the peace the names and additions of Giving bail on
two responsible persons who are ready to be bound for him in postpone-
recognizance that he shall appear and try at the ensuing ment.
sessions; and the prosecutor may, if he thinks fit, then
examine the proposed sureties as to their sufficiency in point
of estate. If they are unopposed or accepted, the recog-
nizance of the defendant and his sureties is read over by the
clerk of the peace to them in the following form:

(i) And see *Gittin's case* (1554), Plowd. 98.

Form of Recognizance to try.

A. B. you acknowledge to owe to our Sovereign Lord the King the sum of , and you C. D. and E. F. severally acknowledge to owe, &c., the respective sums of and to be respectively levied of your goods and chattels, lands and tenements to his Majesty's use, by way of recognizance, upon condition that you A. B. shall appear at the next session of the peace to be holden for this county, to try this indictment to which you have now pleaded not guilty, and not depart without leave of the court.

To this the accused and the pledges answer that "they are content," and depart the court.

Where the indictment is for felony (subject to the provisions of the Habeas Corpus Acts), the prisoner is not entitled to be admitted to bail as a matter of right during the postponement of the trial, although the postponement is caused by the absence of the witnesses for the prosecution; but in all felonies within the jurisdiction of courts of quarter session it is competent to the court to admit prisoners to bail, and in all cases in which the postponement of the trial is not occasioned by the default or misconduct of the prisoner, the court will probably be willing to do so, upon proper bail being forthcoming (*k*).

SECTION 10.

CALLING THE PETIT JURY—CHALLENGING AND SWEARING JURY—GIVING PRISONER IN CHARGE TO JURY.

Calling jury. Twelve jurors (unless they are already in the box after trying others) are then called into it from the panel by the

(*k*) In murder the King's Bench or judge of assize will never admit a prisoner to bail after bill found by a grand jury (except, of course, where required to do so by the Habeas Corpus Act), though it is common practice to do so after a verdict of murder found by a coroner's inquest. The reason for this distinction was thus stated in *Lord Mohun's case* (1697), 1 Salk. 104: "If a man be found guilty of murder by the coroner's inquest, we sometimes bail him, because the coroner proceeds upon depositions taken in writing which we may look into. Otherwise if a man be found guilty of murder by a grand jury, because the court cannot take notice of their evidence, which they, by their oath, are bound to conceal" (and see *R. v. Andrews* (1844), 13 L. J. M. C. 113). In other felonies, not capital, prisoners are bailable at discretion, but not of right: *R. v. Guttridge* (1840), 9 C. & P. 228; *R. v. Chapman* (1838), 8 C. & P. 558. The reason given in *Lord Mohun's case* for refusing bail in murder after bill found by a grand jury, applies equally to felonies within the jurisdiction of quarter sessions, and should serve as a reminder to those who preside over those courts that there may be evidence against prisoners unknown to them, and not disclosed on the depositions taken before the committing justices.

clerk of the peace in this manner :—" *You good men who are returned and impannelled to try the issue joined between our Sovereign Lord the King and the prisoner [or prisoners] at the bar, answer to your names and save your fines*"; and the clerk of the peace then calls the names of the jury.

There are sayings to be found in the books that the proper course is to call the names of the jurors as they stand in the panel, but there is no authority for asserting that this course may not be departed from when convenience requires (*l*). And when they are impannelled in alphabetical order, it seems absurd to require that on each trial the clerk of the peace or assize must begin with the A's (*m*).

Order of calling names of jurymen.

When twelve appear in answer to their names thus called, the prisoners at the bar, who have just been arraigned and pleaded, are informed by the officer of their right of challenge in these terms: " *These good men, whose names you shall hear called, and who do appear (n), are the jury who are to pass between our Sovereign Lord the King and you upon your trial, [or upon your respective trials]; if, therefore, you would challenge them or any or either of them, your time is as they come to the book [viz., the Four Evangelists, or, in case of Jews, the Old Testament] to be sworn, and before they are sworn (o), and you shall be heard*" (*p*).

Informing prisoner of right to challenge.

Where there is no expectation of any considerable exercise of the right of challenge, several prisoners are often thus addressed together, who are to be tried on several charges; but either may desire to exercise the right of challenge separately, or, in legal phrase, to "sever in his challenges"; in which case the other prisoners will be desired to stand back, and he will remain to make his challenges alone. So, where several are arraigned on one indictment for the same offence, every prisoner may challenge peremptorily his number; and in such case he who is challenged by one shall be withdrawn against all.

Severing in challenges.

No challenge either to the array or to the polls can be taken till a full jury appears (*q*); and if a *tales* be prayed, the appearance of twelve must be obtained before any challenge can be made. As soon as that is done, and before the swearing of any juror begins, it is the proper time for the crown or defendant to tender in writing any challenge to the array, *i.e.*, to the whole jury; or where no such challenge is made, or if made, fails, to challenge the polls, *i.e.*, one or more individual

Array or polls.

(*l*) *R. v. Mansell* (1857), 27 L. J. M. C. 4.

(*m*) *Ibid.*

(*n*) See *R. v. Mellor* (1858), D. & B. 470.

(*o*) Bull. N. P. 307; *R. v. Mellor*, *sup.*

(*p*) Prisoners have in general no right to a copy of the panel of jurors, except at *nisi prius*, or by special enactment: 1 Ch. Cr. L. 516, 1st ed.; see 2 Hawk. P. C. c. 41, ss. 21, 22, 23.

(*q*) *R. v. Edmonds* (1821), 4 B. & A. 471; *Vicars v. Langham* (1618), Hob. 235.

Time for
challenging.

jurors (*r*) orally (*s*); but the challenge will be too late if not made before the swearing the juror has *begun*, *i.e.*, before he has taken the book of the Evangelists in his hand by direction of the officer of the court; though if he has so taken it without that authority, the right of challenge remains till the oath be begun to be taken (*t*).

Challenges are of two kinds, *viz.*, either to the *array*, or to the *polls*; and may be made either on the part of the King (that is, the prosecutor), or of the prisoner (*u*).

A challenge to the *array* is an exception to the whole panel, in which the jury are *arrayed*, or set in order, by the sheriff in his return; and must be made before any challenge to the polls (*x*), and, as we have seen, before *any* of the jury are sworn.

Causes of
challenge to
the array.

There are two descriptions of cause of challenge: *principal causes* of challenge, and causes of challenge for *favour*. A *principal cause* of challenge is grounded on such a recognised ground for imputing *partiality*, that, if it be found true, it unquestionably sets aside the array, or the juror. The following are *principal causes* of challenge to the *array*, *viz.*, that the sheriff, or other officer concerned in summoning the jury, is the prosecutor of the indictment or the defendant, or is of kindred to the prosecutor or defendant, or of affinity, if it continue; that the officer has returned any one of the jurors on the nomination of either party; that the prosecutor or defendant has an action against the sheriff, though it is said that if the sheriff be the plaintiff, this is only cause of challenge to the favour; that the sheriff or his bailiff who returned the jury is under the duress of either party; or that the sheriff, or his officer concerned in summoning the jury, is either counsel, attorney, officer, or servant to either party (*x*). In these cases, if the fact (of partiality) be established, the array will at once be set aside by the court without intervention of triers. The want of a knight's being returned on the jury, or the want of hundredors, are no longer grounds of challenge to the array (*y*).

Principal
challenge.

Challenge
for favour.

A challenge to the array *for favour* arises from matter fit to be left to the conscience and discretion of the triers, under the particular circumstances of each individual case. Thus it is said, that if one of the jurors returned be a tenant to the sheriff, or if there be a family connection between one of the

(*r*) The juror must "stand indifferent as he stands unsworn": Co. Lit. 157 b.

(*s*) Trials per *Pais*, 172.

(*t*) Per Tindal, C. J., Parke, B., and Williams, J., in *R. v. Frost* (1839), 9 C. & P. 137; see Bull. N. P. 307, and judgment of Holroyd, J., in *R. v. Brandreth* (1817), 32 St. Tr. 770.

(*u*) 4 Bla. Com. 352.

(*x*) *Ibid.*

(*y*) 6 Geo. 4, c. 50, ss. 13, 28.

jurors and the sheriff, or if the sheriff omit to summon a person named in the panel, this may be ground of challenge of the array *to the favour*—that is, matter to be left to the triers to decide whether it indicates such partiality as should avoid the array (*z*). In short, all circumstances which do not come within the authorities as absolute grounds of challenge to the array, and which yet lead to a reasonable suspicion of partiality in the officer, may be presented to the court as ground of challenge to the favour. The array of a *special* jury may be challenged (*a*).

But a challenge to the array has become very improbable; as, without a gross breach of the law, it is hardly possible that there should be any exercise of partiality in selecting the jury.

The party challenging the array must put the challenge in writing (*b*), and tender it as soon as a full jury appears, before any juror is sworn (*c*), and be prepared to prove the cause strictly (*d*). The specific ground of challenge must be stated, *e.g.*, that the sheriff was a member of a society by which the prosecution was instituted (*e*), or was an inhabitant of the hundred in which the houses whose firing was in question were situate (*f*), or that the array was made at the instance or nomination of the plaintiff, or that the sheriff was cousin of one party, &c.; and a mere allegation that he has not chosen the panel indifferently and impartially, as he ought to have

Mode of
challenging
the array.

(*z*) *R. v. Edmonds* (1821), 4 B. & A. 471, 489.

(*a*) *R. v. Johnson* (1734), Strange, 1000; Cro. Cir. Comp. 105 b, 8th ed.; *R. v. Edmonds*, *sup.*

(*b*) *Trials per Pais*, 172. The following form of a challenge to the array is taken from *R. v. Dolby* (1821), 1 C. & K. 238:—

“And hereupon the said Thomas Dolby prays judgment of the panel of the jurors aforesaid [*or of the panel of the tales aforesaid, as the case may be*], because he says that he is prosecuted by certain persons styling themselves the Constitutional Association, and that the said panel of the jurors [*or panel of the tales, as the case may be*] has been made by X. Y., esquire, sheriff of the county of _____, and he says that the said X. Y., esquire, at the time of the making of the said panel, was one of the subscribers to the said association, and one of the prosecutors of this indictment; and this he the said Thomas Dolby is ready to verify, therefore he prays judgment that the said panel may be quashed.”

In this case Gurney of counsel with the crown took issue upon the challenge in the following words: “I take issue on that challenge.”

The oath administered to the triers was: “You shall well and truly try whether at the time of the making of the panel in question X. Y., esquire, was one of the subscribers to the Constitutional Association and one of the prosecutors of this indictment.”

It will be observed that in *R. v. Dolby* the challenge was a principal challenge. And see Cro. Cir. Comp. 122; Burn’s J., tit. *Jurors*, vol. 3, p. 106, 30th ed.

(*c*) *Ante*, p. 229. *Trials per Pais*, 272.

(*d*) *R. v. Savage* (1824), 1 Moo. C. C. 51; *Brunskill v. Giles* (1832), 9 Bing. 13; see as to triers, *post*, p. 237.

(*e*) *R. v. Dolby* (1821), 1 C. & K. 238.

(*f*) *R. v. Savage*, *sup.*

done according to the law of the realm, was held bad, for not showing in *what respect* the panel was chosen partially, so as to enable the crown to traverse (*g*). If the panel is quashed on a challenge of the array for unindifferency of a sheriff, the course in the King's Bench is for the prosecutor to apply to the court to postpone the trial in order to direct a new process to the coroners (*h*).

Challenges to the polls.

Challenges to the *polls* are challenges of individual jury-men; and are either peremptory, or for cause; by the prisoner, or the crown.

Peremptory challenges.

Peremptory challenges to the polls in felony are (as the name imports) challenges at the mere will of the party challenging, without any reason given (*i*). The prisoner, in cases of treason and felony (*k*), has, from very early times, possessed the right of peremptory verbal challenge by himself personally, and not by counsel (*l*): the numbers he might so challenge have been varied at times by several statutes; but that number is now fixed at *thirty-five* in cases of treason and *twenty* in all cases of felony (*m*). If a party indicted for treason, felony, or piracy, persists in challenging peremptorily a greater number than the law allows, every challenge beyond the number allowed by law is absolutely void, and his trial must proceed as though no such challenge had been (*n*). After a prisoner has peremptorily challenged *twenty*, he cannot withdraw a challenge and challenge another (*o*).

No peremptory challenges in misdemeanours.

In cases of misdemeanours, and in collateral issues, there is no right of peremptory challenging (*p*); but it is usual for the officer, on application to him, to abstain from calling any reasonable number of names objected to, either by the prosecutor or the defendant, taking care that enough be left to form a jury; and this practice has often been sanctioned by the court.

A proper case is for the attornies on both sides to hand in to the clerk of the peace lists of the names of those common jurors on the panel whom they wish not to be called; and a misdemeanour is like a civil action *quoad hoc*. Accordingly, if the jury panel is exhausted by this course, all the names

(*g*) *R. v. Hughes* (1843), 1 C. & K. 235. The demurrer to such a challenge and joinder are always *ore tenus*. Demurrer was in that case allowed, and the trial proceeded to conviction.

(*h*) *R. v. Dolby*, *sup*.

(*i*) Co. Litt. 156.

(*k*) *Gray v. The Queen* (1844), 1 C. & K. 505, n.

(*l*) 2 Hawk. c. 43, s. 4; Trials per *Pais*, 272.

(*m*) 22 Hen. 8, c. 14; 32 Hen. 8, c. 3; 33 Hen. 8, c. 23; 1 & 2 P. & M. c. 10; 6 Geo. 4, c. 50, s. 29.

(*n*) 7 & 8 Geo. 4, c. 28, s. 3.

(*o*) *R. v. Parry and others* (1837), 7 C. & P. 836.

(*p*) *Reading's case* (1679), 7 Howell's St. Tr. 265; *Oates's case* (1685), 10 *id.* 1079.

must be put in the balloting box again, and the parties may then challenge for cause (*q*).

It seems agreed that by the common law the crown has the right of peremptory challenge of as many as it thinks fit, but this has been controlled by the statute 31 Edw. 1, st. 4, called "*ordinatio de inquisitionibus*" (*r*). The 6 Geo. 4, c. 50, s. 29, now stands in the place of the last-mentioned statute, and enacts, "That in all inquests wherein the king is a party, howsoever it be, notwithstanding it be alleged by them that sue for the king that the jurors of those inquests, or some of them, be not indifferent for the king, yet such inquests shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors, they shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the court; and it shall be proceeded to the taking of the same inquisition, as it shall be found, if the challenges be true or not, after the discretion of the court."

It has been held, that there was no intention by this statute of taking away all power of peremptory challenge from the crown, but the object of the statute is attained if the crown be prevented from exercising its power of peremptory challenge, so as to make the trial go off while there are twelve of those returned upon the panel who cannot be proved to be liable to valid objection. Therefore the course has invariably been, from the passing of the statute to the present time, to permit the crown to challenge without cause till the panel has been called over and exhausted, and then to call over the names of the jurors peremptorily challenged by the crown and to put the crown to assign cause, so that if twelve of those upon the panel remain, as to whom no just cause of objection can be assigned, the trial may proceed (*s*). The panel is not called over and exhausted so as to put the crown to show cause of challenge by the mere calling over of the names, for some of the jurors may have omitted to answer to their names when called from accidental or enforced absence, but may have come into court before the calling over of the panel is completed, or before any fresh step has been taken; but it cannot be said to be exhausted till, according to the usual practice of the court and what may reasonably be done, the fact is ascertained that there are no more of the jurors on the panel whose attendance may be procured, and that, without requiring the crown to assign cause of challenge, the trial could not proceed. Thus, where by reason of the challenges of the prisoner, and the peremptory challenges of the crown, the

Peremptory
challenges
for the
crown.

(*q*) See *Marsh v. Coppock* (1840), 9 C. & P. 480.

(*r*) 2 Hawk. c. 43, s. 2.

(*s*) *R. v. O'Coigly and others* (1798), 26 How. St. Tr. 1231; *Mansell v. R.* (1857), 27 L. J. M. C. 4.

panel has been called over without getting a full jury—twelve of the panel being on another jury which had retired to consider their verdict in another case—and upon calling again one of the names peremptorily challenged for the crown the jury which had retired returned into court with their verdict, it was held, that the crown had a right to have those twelve jurors called before being required to show cause to any of the jurors peremptorily challenged, and that until that was done the panel was not exhausted (*t*). A full jury was obtained in that case out of the jury which had returned into court and the trial proceeded, and the prisoner was held rightly convicted.

If all the jurors in the panel are in court when the panel has been called over, and if when it has been once gone through in that way there is not a full jury made, the usual course would be immediately to call the names over again and put the crown to assign cause of challenge; but if all the names were not answered to, the panel should be called over again, omitting to call those who have been peremptorily challenged by the prisoner, with a view to see whether there may not be some of the jurors in the panel who may have come into court, and who may make up a full jury without putting the crown to assign cause of challenge (*u*).

A challenge to the *polls*, *i.e.*, of individual jurors, is like a challenge to the array, a principal challenge, or a challenge to the favour.

The grounds of principal challenge, *i.e.*, for matter which once ascertained absolutely disqualifies, are reduced to four heads: *propter honoris respectum*; *propter defectum*; *propter affectum*; and *propter delictum*.

1. A challenge *propter honoris respectum* is a challenge in respect of the rank and dignity of the juror; as, if a lord of Parliament be impannelled, he may be challenged by either party, or may of his own accord decline serving.

2. A challenge *propter defectum* is for some personal incapacity; as, if a jurymen be an alien (*x*), not having been domiciled in England or Wales for ten years or upwards (*y*), lunatic, or minor; or if he have not sufficient estate. As to this last ground of challenge, the Act which alters the qualification of jurors enacts (*z*), that “If any man shall be returned as a juror for the trial of any issue in any of the courts thereinbefore mentioned (among which is the court of quarter sessions), who shall not be *qualified according to that Act*, the want of such qualification shall be good cause of challenge,

(*t*) *Mansell v. R.*, *sup.*

(*u*) *Ibid.*

(*x*) Co. Litt. 156 b; 6 Geo. 4, c. 50, s. 3.

(*y*) 33 & 34 Vict. c. 77, s. 8.

(*z*) 6 Geo. 4, c. 50, s. 27; *R. v. Sutton* (1828), 8 B. & C. 417.

Causes of
challenge to
the polls.

Principal
challenges.

*Propter
honoris
respectum.*

*Propter
defectum.*

and he shall be discharged upon such challenge if the court shall be satisfied of the fact; and that if any man returned as a juror for the trial of any such issue shall be qualified in other respects according to this Act, the want of freehold shall not, on such trial, in any case, civil or criminal, be accepted as good cause of challenge, either by the crown or the party, nor as cause for discharging the man so returned upon *his own* application: provided that nothing herein contained shall extend in anywise to any special juror." A grand jurymen who found the bill may, it seems, be challenged if on the petty jury (*a*); but if he is sworn, and then offers to leave the box, to which the prosecutor consents, but defendant does not, and the juror remains, and the verdict is guilty, there is no mistrial (*b*).

3. The challenge *propter affectum* is on some palpable ground of bias; as, if the juror be of the blood or kindred to either party; or under his power or direct influence, as tenant or servant, or of council with him (*c*); or if he has declared beforehand that he will pass for the one party out of affection for the party, but it is not a ground of challenge that he has said he will so do from the knowledge he has of the matter and of the truth (*d*), or inhabits a town where the riot which forms the subject of the indictment occurred, and actively engaged in the affair which led to it (*e*). *Propter affectum.*

And an exception against a juror, that he had taken an active part in opposition to an Act of Parliament, the passing of which had led to the riot for participation in which the defendant was indicted, has been upheld (*f*). But it is no good cause of challenge that the jury has found *others* guilty on the same indictment, for the charge is several against each (*g*).

Before forfeitures were abolished it was also a good cause of challenge on the part of a prisoner, that the juror had a claim to the forfeiture which would have ensued from the party's attainder or conviction (*h*). And Lord Coke says, "If either party labour the juror and give him anything to give his verdict, this is a principal challenge; but if either party barely labour the jury to appear and to do his conscience, this is no challenge at all, but lawful for him to do it" (*i*).

An action brought by the juror against either of the parties,

(*a*) See *R. v. Edmonds* (1821), 4 B. & A. 476; *Cook's case* (1696), 13 How. St. Tr. 339.

(*b*) *R. v. Sullivan* (1838), 8 A. & E. 831.

(*c*) Co. Litt. 157 a.

(*d*) Hawk. b. 2, c. 43, s. 28; *R. v. Edmonds* (1821), 4 B. & A. 471, 491.

(*e*) *Cook's case* (1696), 13 St. Tr. 339; *R. v. Edmonds*, *sup.*

(*f*) *R. v. Swain* (1838), 2 M. & Rob. 112.

(*g*) Hawk. b. 2, c. 43, s. 29; *R. v. Edmonds*, *sup.*

(*h*) *Ibid.*

(*i*) Co. Litt. 157 b.

or by either of the parties against him, which implies malice or displeasure, is cause of principal challenge; other actions which do not imply malice or displeasure are but to the favour (*k*).

Propter delictum.

4. The challenge *propter delictum* is for some crime or misdemeanour that affects the juror's character, and renders him infamous; as, a conviction of treason, felony, or perjury, or if he be outlawed. By sect. 10 of the Juries Act, 1870 (33 & 34 Vict. c. 77), "no man who has been or shall be attainted of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry, is or shall be qualified to serve on juries or inquests in any court, or on any occasion whatsoever" (*l*). But it seems that none of the above-cited challenges are principal ones, but only to the favour, unless the record of the outlawry, judgment, or conviction be produced, if it be a record of another court; or the session be shown, if it be a record of the same court (*m*).

Although a juror has not given apparent marks of partiality, yet there may be sufficient reason to *suspect* he may be more favourable to one side than the other, and this is reason for a challenge to the favour. The causes of favour are infinite, and in these inducements to *suspicion* of favour, the question is, "whether the juryman be indifferent as he stands unsworn;" for a juryman ought to be perfectly impartial to either side (*n*).

We have seen (p. 231) that, if the challenge is to the *array*, it must be tendered in writing, and if to the poll, *i.e.*, to an individual juror, must be orally made before the juryman objected to takes the book into his hand by the direction of the officer of the court (*o*).

Parke, B., has ruled that it was no cause of challenge that the juror was a client of the prisoner, who was an attorney, nor that the juror had visited the prisoner as a friend since he had been in prison (*p*).

After a challenge to the array, the party may challenge the polls, but not *vice versá*; and he who has more than one cause of challenge against a juror must take them all at once; though, if he challenge a juror, and the cause be found insufficient, he may nevertheless afterwards challenge him

(*k*) Co. Litt. 157 b.

(*l*) See this section discussed *ante*, p. 91 (note).

(*m*) Co. Litt. 157 b.

(*n*) *Ibid.*

(*o*) *R. v. Frost* (1839), 9 C. & P. 137, *per* Tindal, C. J.; *ante*, p. 230. See *R. v. Mellor* (1858), 27 L. J. M. C. 121.

(*p*) *R. v. Grach* (1840), 9 C. & P. 499. *See qu.* whether this ought not to have been left to the triers to determine.

peremptorily, for perhaps the very challenge may create a prejudice in the mind of the juror so challenged (*q*).

If the *array* be challenged, it lies in the discretion of the court to determine *how* it shall be tried; sometimes it is done by two attornies, sometimes by two coroners, and sometimes by two of the jury; with this difference, that if the challenge be for kindred in the sheriff, it is most fit to be tried by two of the jurors returned; if the challenge be on account of partiality, then by any other two assigned thereunto by the court (*r*).

Mode of trial
of challenges.

When a challenge is made to the *array* for favour, the prosecutor may either confess it, or demur, or plead to it; if he plead, the judges assign triers to try the array, who seldom exceed two, who being chosen and sworn, the clerk of the peace declares to them the challenge, and concludes to them thus,—“*and so your charge is to inquire whether it be an impartial array, or a favourable one;*” and the presiding judge will give them a direction as to what constitutes impartiality if necessary (*s*); and if they affirm the array, the clerk enters underneath the challenge “*affirmatur;*” but if the triers find it favourable, then thus, “*calumnia vera,*” or words to that effect (*t*).

As to challenges to the *polls*: If a juror be challenged before any juror is sworn, two triers are appointed and sworn by the court, thus,—

“You shall well and truly try whether A. B. (the person challenged) stand indifferent between the parties to this issue. So help you God” (*u*).

Oath of trier.

And if after the direction of the court upon the question of impartiality the juror be found indifferent, and sworn or affirmed (*x*), he and the two triers shall try the next juror challenged; and if he be tried and found indifferent, then the two first triers shall be discharged, and the two jurors tried and found indifferent shall try the rest. But if the prosecutor challenge ten, and the prisoner one, and the twelfth be sworn, or affirmed, then he that remains shall have added to him one chosen by the prosecutor, and another by the prisoner, and they three shall try the challenge (*y*); and if six be sworn and the rest challenged, the court may assign any two of the six sworn to try the challenges (*z*).

The truth of the matter alleged as cause of challenge must be made out by witnesses, to the satisfaction of the triers;

(*q*) Co. Litt. 158 a.

(*r*) 2 Hale, 275.

(*s*) *R. v. Edmonds* (1821), 4 B. & A. 471, 491.

(*t*) *Ibid.*

(*u*) Salk. 152.

(*x*) 51 & 52 Vict. c. 46.

(*y*) Co. Litt. 158 a.

(*z*) 2 Hale, 275.

also the juror challenged may, on a *voire dire* (*veritatem dicere*, to speak the truth), be asked on his oath such questions as do not tend to his disgrace, *e.g.*, as to his qualification (*a*), or whether he has taken an active part with reference to a matter which led to a riot, the subject of the indictment about to be tried (*a*). But a juror may not be asked whether he has been whipped for larceny or convicted of felony, and such questions as tend to discover matters of infamy or shame (*b*). Nor may a juror be asked whether he has expressed an opinion or determination hostile to the party challenging, and such matters must be proved by other evidence (*c*).

Exhaustion
of panel.

If on the trial of an indictment under a commission of *gaol delivery* the panel is exhausted by non-appearance, or by challenges of the jurors, but no *tales* are prayed under the attorney-general's warrant, the justices may award a new panel, not reckoning in it the jurors before sworn (*d*), by *ore tenus* ordering the sheriff to return a panel *instante* without further precept (*e*). And in all cases of felony, justices of peace in sessions may, after plea pleaded, issue a *special* precept in the nature of a *venire facias juratores*, commanding the sheriff to return twenty-four, forty-eight, or more jurors immediately, and on his returning a sufficient number of jurors thereon, may proceed to try the party on the same day or at the same session (*f*). And the like, as it seems, in mis-

(*a*) 6 Geo. 4, c. 50, s. 50; *R. v. Swain* (1838), 2 Moo. & R. 112; *R. v. Frost* (1839), 9 C. & P. 129, 136.

(*b*) Trial per *Pais*, 158; Salk. 153; Co. Litt. 158 b.

(*c*) *R. v. Edmonds* (1821), 4 B. & A. 471. At O'Coigly's trial, 3 Harg. St. Tr.; 26 How. St. Tr. 1226, a juror was set aside for having said "Damned rascals!" on looking at the prisoners, clenching his fist the while.

(*d*) 1 Ch. Cr. L. 1st ed. 517.

(*e*) 1 Ch. Cr. L. 506—508. *Per* Treby, C. J., in 4 Harg. St. Tr. 744.

(*f*) Hawk. bk. 2, c. 41, s. 1. It has, however, been said that this may be done by *general* precept, *ibid.* In *R. v. Cropper* (1837), 2 Moo. C. C. 18, a new panel of seventy-two jurors was ordered; and a conviction by a petty jury obtained from them after many more challenges was held valid, 1 Hale, 28, 261; though older authorities state that the justices cannot *compel* the immediate return of jurors to *venires* issued during the *then* session, so as to try even a felon at that session, Dalt. c. 185; Staundford, Pl. Cor. lib. 3, c. 5; Fitzh. Ab. tit. *Corone*, pl. 44; and rest the confessed power of the judges of *gaol delivery* on the ground of the general precept issued by them (as justices of oyer and terminer, 4 Inst. 168) to the sheriff long before their entering the county, to return jurors at the sitting of the court then announced. See 4 Harg. St. Tr. 744; 2 Hawk. c. 41, s. 1; 1 Chit. Cr. L. 508, 509. But Hale says, "this is not the reason, for so it is done by justices of oyer and terminer *and of the peace*, and yet they make *special* precepts of *venire*," 1 Hale, 261; and adds that, "as there goes out a summons of *gaol delivery*, so there issues a general summons of the sessions of the peace," *id.* 28. The forms of the precept to the sheriff, and of the sheriff's warrant to his bailiffs to summon the jurors (*ante*, pp. 25, 26), support this reasoning.

The foregoing note has been left unaltered as it appeared in the first edition of this work, but sect. 20 of the Juries Act, 1870 (33 & 34 Vict.

demeanours, where the party is in prison, or consents to waive the formality of a special precept to the sheriff not returnable till the end of fifteen days (*g*).

However, in most cases the following course, settled on grave consideration, is more advisable. If on trial of a felony the jurors in the panel are so exhausted, that is to say,—it is ascertained that according to the usual practice of the court, and what may reasonably be expected, there are no more jurors in the panel whose attendance may be procured,—either by the challenges of the prisoners only, or by the alternate peremptory challenges of the prisoners and the crown, so that a full jury cannot be had, the proper course is to call over the whole panel in the same order as before (only omitting those who have been peremptorily challenged by the prisoner). Then as each juror appears, the counsel for the prosecution must state a *cause* of challenge, and if they decline to do so, or it is held insufficient, and the prisoner does not challenge for *cause*, and successfully, the juror must be sworn (*h*).

It would seem to be the better opinion that the improper allowance or disallowance of a challenge by the judge is a matter of error on the record, though it was treated as such with some hesitation in *Mansell v. R.* (*i*), and *R. v. Edmonds* (*k*). The challenge and its grounds should be put upon the record and demurred or pleaded to, and judgment passed thereon (*l*). A writ of error should then be brought, and if the judgment were reversed on the ground that the challenge was improperly disallowed, a *venire de novo* would be awarded (*m*); for the disallowance of a challenge is ground not for a new trial but for a *venire de novo* (*n*). But so far as

Allowance or
disallowance
of challenge.

c. 77), seems to the present editors to place a practical difficulty in the way of the sheriff returning a further panel *instantly*. By that section, “no juror shall be liable to any penalty for non-attendance on any jury unless the summons requiring him to attend be duly served six days at least before the day on which he is required to attend, but no longer period than six days shall in any case be required between the service and such last-mentioned day.” It is submitted that, in view of this section, it might in most cases be prudent to adjourn the sessions to a date which would allow of the new jurors receiving the summons contemplated by this section. It is not intended, however, to cast any doubt upon the competence of jurors to waive the benefit of the section.

(*g*) 2 Hawk. c. 41, s. 4; Keilw. 159; 1 Ch. Cr. L. 513; and cases in 3 Burn’s J., tit. *Jurors*, VII.

(*h*) *Mansell v. R.* (1857), 27 L. J. M. C. 4; *ante*, p. 233; *R. v. Geach* (1840), 9 C. & P. 499; *R. v. Turvey and others*, Worcester Lent Assize, 1845; Dick. Q. S., 5th ed. 507.

(*i*) *Sup.*

(*k*) (1821), 4 B. & A. 471.

(*l*) *Gray v. The Queen* (1844), 11 Cl. & Fin. 427; *Mansell v. R.*, *ubi sup.*; *R. v. Edmonds*, *sup.*; *R. v. Mellor* (1858), 27 L. J. M. C. 121, *per* Crompton, J.; *R. v. Levinger* (1870), L. R. 3 P. C. 282.

(*m*) *R. v. Edmonds*, *sup.*

(*n*) *Ibid.*; and see cases there cited.

it is a matter of law any question on it may be reserved for the opinion of the Court of Crown Cases Reserved (*o*).

Authority of judge to excuse juryman, though not challenged.

A judge, on the trial of a criminal case, has authority, though there be no challenge either by the crown or by the prisoner, to excuse a juryman on the panel when he is called, or to order him to withdraw if he be palpably unfit by physical or mental infirmity to do his duty in the jury box, as if he were completely deaf or blind, or afflicted with a bodily disease which rendered it impossible for him to continue in the jury box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relative that he could not duly attend to the evidence (*p*).

Tales.

The sheriff cannot be commanded to return a *tales*, viz., "so many sufficient persons present," as may complete the number of a jury, reduced below its proper number by neglect to appear, challenge, death, or otherwise, without warrant from the attorney-general (*q*). This mode of filling up a jury is therefore seldom resorted to at sessions, but either the prosecutor or the party indicted may obtain the necessary warrant.

Swearing jury in felony.

The challenges being now supposed to have been waived or determined, and the jury full, the clerk of the peace calls the jury to be sworn, every man severally; and this is done, in case of felony, in the following manner:—

"You shall well and truly try, and true deliverance make, between our Sovereign Lord the King and the prisoners at the bar, whom you shall have in charge, and a true verdict give according to the evidence. So help you God."

The crier then counts the jurors, as the clerk of the peace reads their names, and asks them "if they are all sworn."

In cases of misdemeanours the jurors are sworn four at a time, in the following terms:—

In misdemeanour.

"You shall well and truly try the issue joined between our Sovereign Lord the King and the defendant, and a true verdict give according to the evidence. So help you God."

Affirming the jury.

The immemorial law and custom of England entitled the subject to a trial by twelve men *sworn* to deal uprightly with his case. But the provisions of the Oaths Act, 1888 (51 & 52 Vict. c. 46), are applicable to jurors equally as to wit-

(*o*) 11 & 12 Vict. c. 78. See jurisdiction discussed in *R. v. Mellor*, *sup*.

(*p*) *Mansell v. R.*, *sup*.

(*q*) 1 Ch. Cr. L. 1st ed. 508, 518; Foster, 25, 64; 4 Bla. C. 354, 355, *contra*. *Semble*, on mere commissions of *gaol delivery*, no *tales* could be awarded, 4 Inst. 168; *Cook's case* (1696), 4 St. Tr. 728; *id.* 744; though at *nisi prius* it might by 35 Hen. 8, c. 6, now repealed by 6 Geo. 4, c. 50, s. 62.

nesses. Accordingly, if a juror, upon the oath being tendered to him, objects to be sworn, and states, as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, he shall be permitted to make his solemn affirmation in place of taking the oath. The affirmation is of the same force and effect as the oath (*s*). If the juror takes the oath without objection, the circumstance that he may have no religious belief does not affect the validity of the oath (*t*). Further, if the juror desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question (*u*).

Every such affirmation shall be as follows:—

“I, A. B., do solemnly, sincerely, and truly declare and affirm”;

and then proceed with the words of the oath as prescribed by law (*x*), omitting any words of imprecation or calling to witness (*y*).

If the juror desires to be sworn in Scotch form the oath is administered by the presiding judge, who, standing up the while, requires the person to whom the oath is administered to hold up his right hand (or left hand if his right is disabled), and to repeat the words of the oath after him (Oaths Act, 1888, 51 & 52 Vict. c. 46, s. 5). These words are as follows:—

“I, A. B., do swear by Almighty God, as I shall answer to Him at the great day of judgment, that,” &c. [*following the words of the oath*]. “So help me God” (*z*).

A mere misnomer in the christian name of a juror in the panel, which leads to his being sworn, for instance, as Robert Curry instead of Joseph Curry, is not a ground of mistrial if discovered afterwards (*a*). In that case Robert Curry who served was summoned as a jurymen, and though there was a Joseph Curry on the sheriff's panel, he was not then resident in the county. But where a juror answers to and is sworn in the christian and surname of another juror on the panel the

If a juror wrongly sworn.

(*s*) Sect. 1.

(*t*) Sect. 3.

(*u*) Sect. 5.

(*x*) See form before given, p. 240.

(*y*) Sect. 2. For previous statutes as to affirming instead of swearing, see 6 & 7 Vict. c. 85, s. 2, and 30 & 31 Vict. c. 35, s. 8.

(*z*) For form of oath, see reporter's note in *R. v. Mildrone* (1786), 1 Lea. 412. As to the legality of the Scotch form of oath before the Oaths Act, 1888, see *Dr. Owen's case* (1657), 2 Sid. 6; *R. v. Mildrone, ubi sup.*; *Mee v. Reid* (1790), 1 Peake, N. P. C. 33; *R. v. Walker* (1788), 1 Lea. 498.

(*a*) *The case of a Jurymen* (1810), 12 East, 231, n.

court was equally divided, six judges being against six on the question whether it was mistrial or not, whilst the conviction in that trial for murder was confirmed by a majority (*b*). If the mistake be discovered before verdict, the judge might perhaps discharge the juror objected to and call another jurymen, and then take the evidence over again, or he might give the prisoner the liberty of challenging the juror who actually served (*c*).

But it was said in that case, that if a jurymen answers to the name of another jurymen and is sworn in such wrong name, or if a stranger answers to the name of a jurymen and this comes to the knowledge of the judge during the trial, it is the duty of the judge to discharge that jury and to have another impannelled (*d*). But the court was divided into six judges against six judges upon the question, whether a verdict taken upon a trial under such circumstances where the fact of the mistake did not come to the knowledge of the judge was vitiated thereby (*e*).

Giving
prisoner in
charge.

On the trial of a felony a further preliminary form takes place of reading the indictment again, which is unnecessary in misdemeanours, where the defendant is entitled to a copy (*f*). It is termed *charging the jury*. This consists in the clerk of the peace again desiring the prisoner to hold up his hand, and addressing the jury:—

“Gentlemen of the jury, look upon the prisoner and hearken to his charge; he stands indicted by the name of A. B., for that he, on, &c. [*reading the indictment to the end*]. Upon this indictment he hath been arraigned; upon his arraignment he hath pleaded not guilty; your charge, therefore, is to inquire whether he be guilty or not guilty, and hearken to the evidence.”

Charging
after previous
conviction.

In cases where a prisoner is indicted for committing an offence after a previous conviction, and such previous conviction is charged in the indictment, the offender, in the first instance, must be arraigned upon so much only of the indictment as charges the subsequent offence, and if he plead not guilty, or if the court order a plea of not guilty to be entered on his behalf, the jury must be charged in the first instance to inquire concerning such subsequent offence only; and if they find him guilty, or if on arraignment he plead guilty, he must then and not before be asked whether he had been previously convicted as alleged in the indictment, and if he answer that he had been so previously convicted the court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted or stand mute of malice,

(*b*) *R. v. Mellor* (1858), 27 L. J. M. C. 121.

(*c*) *Per* Wightman, J., *R. v. Mellor*, *ibid*.

(*d*) *Per* Cockburn, C. J., in *R. v. Mellor*, *ibid*.

(*e*) *Ibid*.

(*f*) 1 Ch. Cr. L. 555. See *ante*, p. 197.

or will not answer directly to such question, the jury must then be charged to inquire concerning such previous conviction or convictions, and in such case it is not necessary to swear the jury again, but the oath already taken by them is for all purposes deemed to extend to such last-mentioned inquiry.

Provided, that if upon the trial of any person for any such subsequent offence, such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of "guilty" shall be returned; and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence (*g*).

Though after the jury are sworn, formal objections apparent on the face of the record cannot be taken, and substantial objections so apparent can, as a matter of right only, be urged in arrest of judgment, or upon writ of error, yet if the indictment (at least in misdemeanour) be so clearly bad that no judgment can pass upon it, the court will quash it at the instance of the defendant, or discharge the jury from trying it, even though the defendant desires that the trial may proceed, as it is palpable that it would be useless to take the opinion of the jury on the facts. But where the validity of the indictment is doubtful, the court will exercise its discretion, and either quash the indictment or leave the prisoner to move in arrest of judgment or to his writ of error, as the court may, in the circumstances, think right (*h*). Though counsel may suggest, they cannot be allowed to argue such an objection after the jury is sworn, till after conviction, when they may move in arrest of judgment (*i*).

Quashing indictment or discharging jury after jury are sworn.

(*g*) Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 116. A similar provision existed in other statutes, *e.g.*, Coinage Act, 1861 (24 & 25 Vict. c. 99), s. 37. And now it is provided by the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (f), that "a person charged and called as a witness in pursuance of this Act shall not be asked and if asked shall not be required to answer any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that wherewith he is then charged, or is of bad character; unless (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

(*h*) *R. v. Heane* (1864), 33 L. J. M. C. 115.

(*i*) *R. v. Abraham* (1830), 1 M. & Rob. 7, *per* Lord Tenterden.

CHAPTER VI.

OF THE TRIAL.

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SECTION 1.

OPENING SPEECH OF COUNSEL.

Opening of case by counsel.

THE jury being charged with the prisoner, in cases of felony, the trial commences.

In cases of misdemeanour of the more important character, such as nuisances, if there are two counsel for the prosecution, the junior commences by stating the indictment, and the leading counsel then opens the case for the prosecution. In cases of felony, the indictment having been read, this is unnecessary. In a prosecution against several persons for misdemeanour, the counsel conducting the case against them has a right, before opening his case, to the acquittal of any defendant whom he proposes to examine as a witness, and counsel for the defence have no right to make any objection to this course being taken (a).

The leading counsel for the prosecution opens his case according to his instructions, and this he ought always to do where the prisoner is defended by counsel; but where the

(a) *R. v. Rowland* (1826), R. & M. 401.

prisoner is not defended by counsel, it is not necessary to open the case unless there be some particularity in the facts of the case to require it (*b*). A prosecutor conducting his case in person, and who is to be examined as a witness in support of it, has no right to address the jury as counsel (*c*). When a counsel addresses the jury in a case of felony, he ought to confine himself to a simple statement of the facts which he expects to prove; and in cases where the prisoner has no counsel, he should particularly refrain from stating any part of the facts, the proof of which from his own brief may appear doubtful, except with proper qualification; for he will either produce on the minds of the jurors an impression which the mere failure of the evidence may not remove, in instances where the prisoner is unable to comment on it with effect, or may awaken a feeling against the case for the prosecution which in other respects it may not deserve. The court, too, if watchful, cannot fail, in the summing up, to notice the discrepancy between the statement and proof. This is still more important with respect to opening any expression of the prisoner. See *infra*.

But in all cases, as well of felony as misdemeanour, where a prisoner has counsel, not only may the facts on which the prosecution rests be stated, but they may be reasoned on, so as to anticipate any line of defence which may probably be adopted (*d*). For as counsel for parties charged with felony may now address the jury in their defence, as might always have been done in misdemeanour, the position of parties charged with either degree of offence is thus assimilated, in cases where they have counsel; and it is no longer desirable for the prosecutor's counsel to abstain from observing generally on the case he opens, in such a manner as to connect its parts in any way he may think advisable to demonstrate the probability of guilt, and the difficulty of an opposite conclusion. Thus he may anticipate an attack being made upon one of the witnesses for the prosecution, and state that there is no foundation for any imputation upon her (*e*). In this exercise of his duty, he will refrain from invective, or appealing to the prejudices or passions of a jury; it being neither in good taste nor right feeling to struggle for a conviction as is done for a verdict in a civil cause. On the other hand, should he be called on for a reply, his situation may be very different, as occasions will sometimes occur where the fraud and perjury of a defence will require to be searchingly and unsparingly exposed.

(*b*) *R. v. Gascoigne* (1837), 7 C. & P. 772; *R. v. Jackson*, *R. v. Boaler* (1837), 7 C. & P. 773.

(*c*) *R. v. Brice* (1819), 2 B. & A. 606.

(*d*) *R. v. Courvoisier* (1840), 9 C. & P. 362.

(*e*) *Ibid*.

But now, by the 28 Vict. c. 18, s. 2, the counsel for the prosecution, in cases where the prisoner is defended by counsel who does not call witnesses, has an opportunity given him of summing up the evidence for the prosecution, and therefore has the opportunity of explaining any variances or discrepancies between his opening and the proof which he had not formerly. As to this section, see *post*, p. 326.

As to opening
prisoner's
statements.

Before we dismiss the subject of the opening by the prosecutor's counsel, we must advert more particularly to the proper manner of stating *oral declarations* of the prisoner, whether amounting to *confessions*, strictly so termed, viz., made before a magistrate, or to evidence of less cogency. As to the latter, it is common to find that a very material part of a prosecutor's case consists of *expressions used by a prisoner*, of more or less application to the matter in issue. When this is the case, it must be recollected that conversation is, of all other evidence, that which is most liable to be misunderstood, imperfectly remembered, and misstated; while its whole sense and bearing may be changed by omitting or transposing a word. Hence it was often the practice of counsel to abstain from exercising their strict right to open for the prosecution the circumstantial detail of the words used, on the ground that, though it might turn out that the prisoner had not used them at all, or at least not in the sense imputed, a prejudice might be created in the minds of the jury, which any variance in the evidence, short of absolute contradiction, might fail to destroy. As was laid down by a first-rate authority on such subjects, Mr. Baron Garrow, the correct practice was to state no more than the *general effect* of the expressions used (*f*). Besides which, if the prosecutor's counsel undertakes to state in detail, from his instructions, the precise tenor of the words insisted on as material, any perceptible variance in the testimony, though unimportant in itself, may be wrested to produce the effect of overturning the rest of his case, though founded on reasonable grounds distinct from the prisoner's admission. But where the prosecutor's counsel, in his opening address, alluded to certain declarations of the prisoner as about to be proved, and relied on them as material against him, but left them to be detailed by the witnesses, so that their *general effect* remained so wholly unknown to the prisoner and his counsel as to prevent them from shaping their defence properly, Mr. Baron Parke is reported to have interposed, saying that the fair and proper course towards the prisoner is to state in the opening all that is intended to be proved (*g*), viz., not only facts but declarations; as any discrepancy between the opening address and the testimony of

(*f*) *R. v. Deering* (1831), 5 C. & P. 165.

(*g*) *R. v. Hartel* (1837), 7 C. & P. 773; *R. v. Orrell* (1835), 1 M. & Rob. 468; also stated less fully in 7 C. & P. 774, n.

the witnesses might operate favourably for him in the minds of the jury (*h*). On the whole, then, with respect to expressions of the prisoner, which are material to the prosecutor's case by way of admission, it appears proper to state them in such a general way as will draw the attention of the prisoner or his counsel to the time and place when, and the parties to whom, they are alleged to have been used, as well as to their general purport, without affecting to detail them minutely (*i*). If such particularity is attempted in the opening, it should be accompanied by such observations as will be calculated to prevent any unsubstantial variance in any particular proof from weighing against the general scope and bearing of the rest. Though since the power of summing up the case in prosecutions given by the 28 Vict. c. 18, any such variance can be explained at that time.

But in opening to a jury the *confession* of a prisoner before a magistrate as part of the evidence by which a prosecution will be supported in the whole, or in part, the duty of a counsel is clearly laid down to be, not to state more than its general effect; the reason assigned in all the cases being, that the confession may turn out to have been made under circumstances rendering it inadmissible in evidence (*k*). As this ruling appears grounded on the prejudice which might be created in the minds of the jury by opening a detailed statement of a confession, and which might not be removed, notwithstanding that in the result the confession turned out inadmissible in evidence, it is not easily reconciled with Mr. Baron Parke's doctrine, that such declarations of a prisoner as do not amount to confession of the *corpus delicti* shall be opened in order that they may be benefited by any subsequent discrepancy in proof. In both cases it seems the right course to open the general effect of a prisoner's declarations and confessions. If additional evidence is discovered after the opening for the prosecution has concluded, it must, of course, be heard, but cannot be made the subject of a second address for the prosecution (*l*).

As to opening confession.

(*h*) *R. v. Hartel*, by Parke, B.: and again, by the same learned judge, in *R. v. Davis* (1837), 7 C. & P. 786. It does not appear from this latter case, as reported, whether the prisoner's expressions, as there stated by the prosecutor's counsel under the judge's ruling after objection taken to them, were stated in so many words, from the counsel's instructions, or only the *general bearing and effect* of them.

(*i*) See *R. v. Swatkins* (1831), 4 C. & P. 548.

(*k*) *R. v. Swatkins and others*, *sup.*; *R. v. Davis* (1837), 7 C. & P. 786; *R. v. Orrell* (1835), 7 C. & P. 775.

(*l*) *R. v. Courvoisier* (1840), 9 C. & P. 362.

SECTION 2.

EXAMINING WITNESSES FROM THE DEPOSITIONS WHERE NO COUNSEL—CALLING WITNESSES NAMED ON THE BACK OF THE INDICTMENT.

Examining witnesses from the depositions where no counsel appear.

Where no counsel is engaged for the prosecution, there is of course no opening, the prosecutor himself never being allowed personally to address the jury (*n*). For the cause is not his, but that of the crown, though conducted at his instance; and on that account alone formerly it was that he could be examined at all, and now, when so examined, must be sworn on the book like another witness. In these latter cases, however, the court will have had an opportunity of learning the nature of the case, and of the evidence to be adduced from the depositions which will have been delivered to the officer of the court before the day of the sessions, though Maule, J., has expressed his disapprobation of the practice of the court acting as counsel for the prosecution by making a case against a prisoner after a perusal of the depositions, and handed the depositions, where no counsel was instructed, to a counsel; for, as he said, the fiction of law was that the court was of counsel for the prisoner and not for the prosecution (*o*); and a counsel so instructed ought to act as counsel for the prosecution in all respects and not confine himself to examining witnesses (*p*).

Of the depositions.

The depositions consist of the “information on oath” of the witnesses, taken down in writing before the committing magistrate, which on this account, as well as that of the right of the prisoner to inspect them at his trial, are required by the 11 & 12 Vict. c. 42, s. 20, to be delivered by the justice or justices who have taken the same “or he or they shall cause the same to be delivered to the proper officer of the court in which the trial is to be had, before or at the opening of the said court, on the first day of the sitting thereof, or at such other time as the judge, recorder or justice who is to preside in such court at the said trial shall order and appoint.”

Examining from the depositions.

A right is given to the prisoner to have copies of the depositions given him by sect. 27 of the 11 & 12 Vict. c. 42, which provides “that at any time after all the examinations aforesaid shall have been completed, and before the first day of the assizes or sessions, or other first sitting of the court at which any person so committed to prison, or admitted to bail as aforesaid, is to be tried, such person may require and shall be

Right of defendant to copies of depositions before trial.

(*n*) *Ante*, p. 245.
(*o*) *R. v. Page* (1847), 2 Cox, 221.
(*p*) *R. v. Littleton* (1840), 9 C. & P. 671.

entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three half pence for each folio of ninety words."

This section gives the right to copies of the depositions only when the party has been bailed or committed to prison for some offence for which he is to be tried, and with a view of enabling him to prepare for trial; it does not, therefore, apply to the case of a person committed to prison for default of sureties to keep the peace, and who has been discharged by the sessions (g).

By 6 & 7 Will. 4, c. 114, s. 4, "All persons under trial shall be entitled at the time of their trial to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had."

Right of defendant to inspect depositions at the trial.

If these depositions are not returned, as they ought to be, the court can merely call on the witnesses upon the back of the indictment to be sworn, and give their own narrative.

In cases of *felony*, where the prosecutor does not think fit to examine a witness whose name is indorsed on the bill, the court will usually, at the prisoner's request, require such witness to be placed in the box as a witness for the prosecution, in order to his cross-examination by the prisoner, but this is not of course, even in felony, and any examination to which he may be subjected for the prosecution, after being so cross-examined, must be treated as a mere re-examination, limited to the points on which he has been cross-examined.

Calling witnesses named on the back of the indictment.

In trials for *misdemeanours* which assimilate more to civil proceedings, this practice of putting witnesses in the box, who, though on the back of the indictment, are not called for the prosecution, does not prevail.

In neither class of offences is there any objection to examining witnesses at the trial who have not been before the committing magistrate or the grand jury; but it is usual for notice to be given to a prisoner a reasonable time before the trial comes on of any additional evidence proposed to be adduced by the prosecution, and the omission so to do affords matter of comment.

If a juror is wanted to give evidence, he must be sworn and examined as a witness (r).

(g) *Ex parte Humphrys* (1850), 19 L. J. M. C. 189.

(r) *Per cur.* Style's R. 233; *Bennett v. Hertford Hundred* (1650), 12 Vin. Ab. 47.

SECTION 3.

OF THE PARTS OF THE CHARGE WHICH MUST BE SUPPORTED BY
PROOF.

Amount of
proof re-
quired.

In order to convict the prisoner or defendant, the prosecutor must, subject to the statutory enactments now in force on the subject, always prove *so much* of the indictment as will amount to a complete allegation of an offence of the *same quality and degree* for which he is indicted, though it need not be proved to the *full extent* charged (*s*). Thus, on an indictment for felony, if a misdemeanour only were proved, the prisoner must at common law have been acquitted (*t*).

Upon indict-
ment for
robbery.

By statute, however, some laxity has been introduced. Thus, by 24 & 25 Vict. c. 96, s. 41, "If upon the trial of any person upon any indictment for *robbery* it shall appear to the jury, upon the evidence, that the defendant did not commit the crime of robbery, but that he did commit *an assault with intent to rob*, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried, as is herein lastly mentioned, shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery, for which he was so tried."

When com-
plete offence
charged, con-
viction may be
of attempt to
commit the
same.

And when the evidence offered to prove the actual commission of the offence charged falls short of the proof required, and amounts only to proof of an attempt to commit it, in order to prevent persons so charged from escaping conviction, it is enacted by 14 & 15 Vict. c. 100, s. 9, that if, upon the trial of any person charged with any felony or misdemeanour, it shall appear to the jury upon the evidence, that the defendant did not *complete* the offence charged, but that he was guilty only of an attempt to commit *the same*, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is not guilty of the felony or misdemeanour charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanour charged in the said indictment; and no person so tried, as herein lastly mentioned, shall be liable to be afterwards prosecuted for an

(*s*) *R. v. Hollingberry* (1825), 4 B. & C. 329; *R. v. Hunt* (1811), 2 Campb. 584.

(*t*) *R. v. Westbeer* (1739), Stra. 1133; and *vice versâ*, *ante*, p. 152.

attempt to commit the felony or misdemeanour for which he was so tried. To permit a conviction upon this section the evidence must show an attempt to commit the offence charged.

And by 14 & 15 Vict. c. 100, s. 12, if upon trial of any person for any misdemeanour it shall appear that the facts given in evidence amount in law to a felony, such person shall not be entitled to be acquitted of such misdemeanour (*u*).

So, by 24 & 25 Vict. c. 96, s. 88, if a person indicted for obtaining goods by false pretences be proved to have obtained them in such manner as to amount to larceny, he is not to be acquitted (*u*).

And by 24 & 25 Vict. c. 96, s. 72, where embezzlement is charged and larceny proved, the jury may find not guilty of the embezzlement and guilty of the larceny, and *vice versa* (*u*). Larceny and embezzlement, and *vice versa*.

If upon the indictment for the felony of administering noxious drugs, so as thereby to occasion grievous bodily harm, the jury may find a verdict of guilty of the misdemeanour of administering such drugs with intent to injure, aggrieve, or annoy (*x*). So, at common law, upon an indictment for a felony of a grave nature the defendant might always be found guilty of a felony of lesser atrocity, included within the felony charged, *e.g.*, on an indictment for murder, he might be convicted of manslaughter (*y*); on an indictment for burglary, of stealing in a dwelling-house (*z*); or on an indictment for breaking into a house and stealing therein, of simple larceny. Where a common law felony or misdemeanour is by statute subjected to more severe punishment if committed under particular circumstances, a person indicted under the statute may be convicted of the common law offence, if the prosecutor fail in proving the circumstances which would make it punishable by the statute, provided that the indictment sufficiently states the common law offence (*a*). A charge in the plural, as of extorting twenty shillings (*b*), or of conspiring to prevent workmen from continuing to work (*c*), is supported by proof of extortion of one shilling, and of conspiring to prevent one workman from working. If two intents are charged for one act, as assaulting a girl with intent to abuse *and* carnally know her, it will be enough to prove either (*d*), for the averment is divisible. So it is enough to prove a larceny of one of several articles charged to have been stolen by the defen-

When greater offence includes the less.

(*u*) See these sections, *ante*, pp. 152, 153.

(*x*) 24 & 25 Vict. c. 100, s. 25, *ante*, p. 154.

(*y*) Co. Litt. 282 a.

(*z*) *R. v. Butterworth and others* (1823), Russ. & Ry. 520; *R. v. Johnson* (1841), C. & Mar. 218; and see 1 Stark. Ev. 2nd ed. 372, 379.

(*a*) 2 Hale, 191, 192; *R. v. Beaney* (1820), R. & R. 416.

(*b*) *Per* Holt, C. J., in *R. v. Burdett* (1696), 1 Ld. Raym. 149; *R. v. Carson* (1815), R. & Ry. 303.

(*c*) *R. v. Bykerdike* (1832), 1 M. & Rob. 179.

(*d*) *R. v. Dawson* (1821), 3 Stark. 62. See *R. v. Evans* (1821), *id.* 35;

dant(e). But if a prisoner is indicted for stealing several articles, and the jury, though convinced that he did steal some of them, are unable to say which, he ought to be acquitted, for, if convicted at all, he ought to be convicted of some definite offence(f); and this is a principle of general application. So the defendant may be convicted of a common assault on an indictment for assaulting a constable in the discharge of his duty; or upon an indictment for an assault occasioning actual bodily harm(g); or on an indictment for unlawful and malicious wounding(h); or upon an indictment for cutting and wounding with intent to disable, &c.(i); or before 1885, upon an indictment for assaulting and carnally knowing a girl between ten and twelve years old(k), which was then only a misdemeanour, and since 1885, by parity of reasoning, it is submitted, upon an indictment for assaulting and carnally knowing a girl over thirteen but under sixteen years old.

When it will suffice to prove one of two things charged.

When the indictment charges that the defendant did two things, either of which is an offence of the same degree, it will be sufficient to prove that he did either. Thus, on an indictment alleging that the prisoner "forged, *and* caused to be forged," it is enough to show either(l). And if a party be charged with composing, printing, *and* publishing a libel, he may be found guilty either of printing *or* publishing merely. "For," as observed by Lord Ellenborough, "this distinction runs through the whole criminal law; and it is invariably enough to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified" (m).

As to cases of charging several jointly with a single offence and conviction of separate parts of that offence, see *ante*, pp. 146, 147.

We have already seen (*ante*, p. 156) that there are averments in the indictment which, if through the technical accuracy of the law they are inserted, need not be proved. For instance, the day or hour of committing the offence is never material. Where, indeed, *time* is of the essence of the offence, it must appear to have been done at such an hour as

R. v. Jones (1831), 2 B. & Ad. 615, 616; and *R. v. Middlehurst* (1757), 1 Burr. 400.

(e) 2 Hale, 302: *R. v. Ellins* (1810), R. & Ry. 188. In this case the indictment charged the prisoner under 7 Geo. 3, c. 30, s. 1, to have been employed in two branches of the Post Office, and proof that he was employed in one branch only sustained the indictment.

(f) *R. v. Bond* (1850), 19 L. J. M. C. 138.

(g) *R. v. Oliver* (1860), 30 L. J. M. C. 12; *R. v. Yeadon* (1861), 31 L. J. M. C. 70.

(h) *R. v. Taylor* (1869), L. R. 1 C. C. R. 194.

(i) *R. v. Walker* (1843), 2 Moo. & R. 446.

(k) *R. v. Guthrie* (1870), L. R. 1 C. C. R. 241.

(l) *R. v. Middlehurst*, *sup.*

(m) *R. v. Hunt* (1811), 2 Campb. 584.

will constitute the crime; but it need not be proved even then at the precise hour laid in the indictment. Thus, on a prosecution of a person for being "found armed at night, with intent to kill game," it must be shown that the defendant was found between the hours which the statute defines to be "night" for its purposes; but the proof need not further correspond even here with the allegation (*o*). As to *place*, it is always necessary to show that the offence was committed within the county, city, borough, or other part of the county to which the jurisdiction of the court extended, where the venue is laid; or that such part of the transaction occurred there as may give the court jurisdiction to try it; except where the common law locality of offences has been superseded by statutable provision (*p*). And where the offence is, in its nature, *local*, that is, where local description of place is of the essence of the charge, as in injuries to real property, burglary, stealing in a dwelling-house, forcible entry, or the like (*q*), the parish or *vill* laid in the indictment must be correctly proved. But in other cases, although a *vill* must be stated, the offence may be proved in any other *vill* within the county, provided there be in the county such a *vill* as is laid; for it has been said that, though the prosecutor need not prove affirmatively that there is, if it be proved that there is not, the prisoner must be acquitted (*r*). However, this was held otherwise in an indictment for setting fire to a stack of beans, to which local description was given, by laying a parish, &c. and stating the stack to be *there situate*, the judges holding that charge to be transitory only, with nothing of locality in it (*s*).

Immaterial
averments.

With respect to the charge itself, the material *description* must always be accurately proved, though unnecessary averments introducing or accompanying it may be rejected as surplusage. Thus, the name of the owner of goods stolen; of the party alleged to have been killed (*t*); of the owner of a dwelling-house broken (*u*), must always be proved as laid, otherwise the prisoner might be convicted of one offence on a record charging another, and might be prevented from maintaining a plea of *autrefois convict* or *autrefois acquit* if subsequently indicted for the same offence (*x*); but variances

(*o*) *Ante*, p. 166.

(*p*) See *ante*, p. 166.

(*q*) *Ante*, p. 166; *R. v. Woodward* (1831), 1 Moo. C. C. 323.

(*r*) See 3 Campb. 76; *R. v. Bullock* (1825), 1 Moo. C. C. R. 324; *R. v. Dowling* (1826), Ry. & M. N. P. C. 433.

(*s*) *R. v. Woodward*, *sup.* (*sed qu.*).

(*t*) *R. v. Brinklett* (1828), 3 C. & P. 416.

(*u*) *Secus*, if the indictment charges "robbery in a dwelling-house," and robbery is proved; for the offence is complete without proving anything about the dwelling-house: *Pye's case* (1790), East's P. C. 785; *Johnston's case* (1793), *id.* 786.

(*x*) *Ante*, p. 212 *et seq.*

between the allegations and the proof may be amended under the provisions of the 12 & 13 Vict. c. 45, s. 10, and 14 & 15 Vict. c. 100, s. 1.

The strictness of the common law in this respect is now relieved by a power to amend the record during the course of a trial which is given by statute in certain cases, thus:—

Variances
between in-
dictment and
proof in case
of writings.

When any variances appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment whereon the trial is pending, they may be forthwith amended, for by 12 & 13 Vict. c. 45, s. 10, “Every court of general or quarter sessions of the peace, on the trial of any offence within its jurisdiction, whenever any variance or variances shall appear between any matter in writing or in print produced in evidence, and the recital or setting forth thereof in the indictment, shall have the same power in all respects to cause the indictment to be amended, which is given to courts of oyer and terminer and general gaol delivery with regard to offences tried before such last-mentioned courts by virtue of 11 & 12 Vict. c. 46, and after such amendment the trial shall proceed in the same manner in all respects, both with regard to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance or variances had appeared”; and by 11 & 12 Vict. c. 46, s. 4, “any court of oyer and terminer or general gaol delivery, if such court shall see fit so to do, may cause the indictment for any offence whatever whereon the trial was pending in such a case to be forthwith amended in such particular or particulars by some officer of the court.”

Variances in
various
matters.

Still greater powers of amendment are given by the 14 & 15 Vict. c. 100, s. 1. “Whenever on the trial of any indictment (which includes plea, sect. 30) for any felony or misdemeanour there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the *name* of any county, riding, division, city, borough, town corporate, parish, township or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate therein stated, or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate therein stated, or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offence, or in the christian name or surname, or both christian name and surname, or other description whatsoever of any person or persons whatsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the *ownership* of any property named or described therein, it shall and may be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and

that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended according to the proof by some officer of the court or other person both in that part of the indictment where such variance occurs, and in every other part of the indictment where it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable, and after any such amendment the trial shall proceed whenever the same shall be proceeded with in the same manner in all respects and with the same consequences both with respect to the liability of witnesses to be indicted for perjury and otherwise as if no such variance had occurred, and in case such trial shall be had at *visi prius*, the order for the amendment shall be indorsed on the *postea* and returned together with the record, and thereupon such papers, rolls and other records of the court from which such record issued as it may be necessary to amend shall be amended accordingly by the proper officer, and in all other cases the order for the amendment shall either be indorsed on the indictment or shall be engrossed on parchment and filed, together with the indictment, among the records of the court. Provided that in all such cases where the trial shall be so postponed it shall be lawful for such court to respite the recognizances of the prosecutor and witnesses and of the defendant and his surety or sureties, if any, accordingly, in which case the prosecutor and witnesses shall be bound to attend to prosecute and give evidence respectively, and the defendant shall be bound to attend to be tried at the time and place to which such trial shall be postponed, without entering into any fresh recognizances for that purpose, in such and the same manner as they were originally bound by their recognizances to appear and prosecute and give evidence at the time and place to which such trial shall have been so postponed.

Amendment of indictment, &c. according to the proof.

Postponement of trial.

Provided also, that where any such trial shall be to be had before another jury, the crown and the defendant shall respectively be entitled to the same challenges as they were respectively entitled to before the first jury was sworn."

Challenges of jury after postponement of trial on amendment.

By sect. 3, if it shall become necessary at any time, for any purpose whatsoever, to draw up a formal record in any case where any amendment shall have been made under the provisions of this Act, such record shall be drawn up in the form in which the indictment was after such amendment made, without taking any notice of the fact of such amendment having been made.

An indictment which charged the obstruction of a footway may be amended when one of the termini of the way has been misdescribed (*y*). So also an indictment for larceny, where

What descriptions of amendments are within the statute.

the ownership of stolen property is wrongly described (*z*); and where, on an indictment for perjury, alleging that the offence was committed on the trial of a prisoner for burning a barn, the certificate of conviction related to a charge of setting fire to a stack, the indictment was amended (*a*).

Time for
amending.

It is not too late to apply for an amendment though the counsel for the prisoner may have addressed the jury (*b*), but the amendment must be made before the case is left to the jury, there being no power to amend after verdict (*c*).

An inaccuracy in the description of a thing, *e.g.*, an Act of Parliament, may be so slight and insignificant as not to leave in doubt for a moment what thing was referred to, and in such a case it can hardly be said to amount to a variance necessary to be amended, but nevertheless, if observed, it may properly be amended (*d*).

The prose-
cutor must
prove the
affirmative of
the entire
issue.

In general, the proof of the entire issue, on the plea of "*not guilty*," lies in the first instance on the prosecutor, who must establish everything essential to the charge. Thus, on an indictment against a parish for not repairing a highway, he must, on the plea of not guilty, show that the way is a public way; that the part stated to be out of repair lies within the parish; and that it is, in fact, out of repair. In general, however, a mere negative averment, though necessary to be alleged by a prosecutor in consequence of the rule of pleading on a statute, need not be proved by him, where the affirmative must be in the knowledge of the defendant; thus, in an information for sporting without a qualification before the late Act 1 & 2 Will. 4, c. 32, abolished qualification, it was not necessary to show the absence of it, though it must have been negatived in the conviction (*e*); and on an information for selling ale by retail without due licence, it lies on the defendant, when shown to have sold ale, to prove his licence. *Knowledge* and *intent*, when material, must be made out by the prosecutor: he cannot, of course, make them out by direct evidence, unless when they have been confessed; but both may be gathered from the conduct of the party as shown in proof (*f*); and when the tendency of his actions is direct and manifest, he must always be presumed to have designed the result when he acted. A defendant accused of misdemeanour, or his counsel in open court, may, at the trial, make admissions of facts and thus dispense with formal proof by the prosecutor; but the

Proof of
knowledge
and intent.

(*z*) *R. v. Vincent* (1852), 21 L. J. M. C. 109; *R. v. Fullerton* (1853), 6 Cox, C. C. 194; *R. v. Webster* (1861), 31 L. J. M. C. 17.

(*a*) *R. v. Neville* (1852), 6 Cox, C. C. 69, *per Williams, J.*

(*b*) *R. v. Fullerton, sup.*

(*c*) *R. v. Larkin* (1854), 23 L. J. M. C. 125; *R. v. Frost* (1855), 24 L. J. M. C. 116.

(*d*) *R. v. Westley* (1859), 29 L. J. M. C. 35.

(*e*) *R. v. Turner* (1816), 5 M. & S. 206.

(*f*) *R. v. Francis* (1874), 43 L. J. M. C. 97.

court will not allow any admissions made or signed by the defendant or his attorney out of court, before the trial, to be acted upon (*g*). In felony there can be no such admissions to dispense with proof.

SECTION 4.

OF THE DEGREE (OR QUANTITY) OF PROOF REQUIRED TO SUBSTANTIATE A CHARGE.

The *quantity of proof* necessary to support a charge must, of course, depend in general on the circumstances of each case, for which no rules can be given. A single witness swearing to the actual crime, or to such facts as necessarily lead to the inference that it has been committed, if unshaken and uncontradicted, is quite sufficient to substantiate the charge. And the prisoner's confession before a magistrate, if made in consequence of a charge against him, and in a direct and positive manner, voluntarily and without promise or threat operating on his mind at the time of making it, is sufficient, standing alone, to be presented to the jury, and for them to convict upon, if they believe it to be true (*h*); even though there is no proof *aliunde* that the crime charged was committed (*i*). Further, as to confession, see *post*, p. 259.

Again, in point of law, as an accomplice is a competent witness, a jury believing his story might convict on his testimony alone, and such conviction would be valid (*k*). But it is usual for judges, in the exercise of a sound discretion, to direct the acquittal of a prisoner, unless the accomplice be corroborated by evidence admitting of no suspicion, not as to the whole case, for then the testimony would be needless, but as to such parts as satisfactorily show that he has not fabricated the story. And he should be confirmed in some facts affecting the individuals whom he accuses; *e.g.*, by showing the prisoner and the accomplice together under circumstances which were not likely to have occurred unless there had been concert between them (*l*); because otherwise his whole

Quantity of
proof.

Confession.

Degree of
proof.

Accomplice.

(*g*) *R. v. Thornhill* (1838), 8 C. & P. 575.

(*h*) See further, p. 259; *R. v. Whetling* (1789), 1 Leach, 311, n.; *R. v. Eldridge* (1821), R. & Ry. 440. See cases collected, Burn's Justice of the Peace, tit. *Confession*, Vol. I.

(*i*) *R. v. Falkner and Bond* (1822), R. & Ry. 482.

(*k*) *R. v. Attwood* (1787), 2 Leach, 464, cited in *R. v. Jones* (1809), 2 Campb. 132.

(*l*) *R. v. Farler* (1837), 8 C. & P. 106; where in a case of night poaching, on 9 Geo. 4, c. 69, s. 9, the only confirmation of the accomplice's testimony was that he and the prisoner were drinking together at a public-house, commonly frequented by the prisoner, and left the house together when shut up for the night.

narrative may be true in its circumstances, and abundantly confirmed, and yet false as to the alleged actors, for he may speak truly as to all the facts, which he would know from having been present, and yet may substitute one of the prisoners for himself in his narrative (*m*). But this is a mere matter for the discretion of the court; and there have been instances where, on consideration, it has been deemed proper to convict and to execute prisoners on the evidence of an accomplice who was confirmed as to some of the party, but not as to others; or as to some of the circumstances, but not as to the identity of the prisoner as the guilty person (*n*). On the other hand, where an accomplice swearing positively to several prisoners was confirmed as to some, and not confirmed as to others, Vaughan, B., recommended the jury to acquit the latter, and they were accordingly acquitted, while those as to whom the accomplice was confirmed were convicted and executed (*o*). But where, on an indictment against a principal for stealing, and accessories for receiving, the case against the principal was proved by the testimony of an accomplice, who was not confirmed as to the larceny of the principal, but proved the receiving, and was confirmed as to that, all the prisoners were held entitled to acquittal (*p*). But this would now be otherwise since the statute which enacts that receivers of stolen property can be indicted for a substantive felony, whether the principal felon shall or shall not have been previously convicted (*q*).

SECTION 5.

OF THE KIND OF PROOF BY WHICH A CHARGE MAY BE SUPPORTED.

The kind of proof by which charges may be sustained includes all relevant facts, evidenced by competent witnesses, which tend to produce a moral certainty of the imputed guilt. It may be *positive*, as by the direct testimony of a witness who saw the fact; it may be *circumstantial*, when a number of facts are presented as inconsistent with any other hypothesis than that of the prisoner's guilt; it may be *presumptive*, when

(*m*) *R. v. Stubbs* (1855), 25 L. J. M. C. 16.

(*n*) *R. v. Dauber* (1821), 3 Stark. N. P. C. 34; *R. v. Jones* (1809), 2 Campb. 133; *R. v. Birkett* (1813), R. & Ry. 252.

(*o*) *R. v. Field and others*, Berks Spring Assizes, 1828; Dick. Q. S. 5th ed. 520.

(*p*) *R. v. Wells and others* (1829), Mood. & M. 327, *cor.* Littledale, J. See *R. v. Birkett* (1839), 8 C. & P. 732.

(*q*) See 24 & 25 Vict. c. 96, s. 91.

the possession of a stolen article casts on the prisoner the burden of showing how he obtained it; or it may be *confessional*, when the party himself has admitted the guilt which is in issue. The first three descriptions of proof are merely matters for the decision of the jury; but the last is subject to legal restrictions which we shall briefly notice. It is said that confessions are the weakest and most suspicious of all testimony, ever liable to be obtained by artifices, false hopes, promises of favour or menaces, seldom remembered accurately or reported with due precision, and incapable in their nature of being disproved by other negative evidence(*r*). The ground for rejecting evidence of confessions is the dangerous nature of the evidence, and not any presumption that it is false or untrustworthy(*s*).

Presumptive.
Confessional.

A confession made by a prisoner, in the course of an investigation by a magistrate of a charge of felony or misdemeanour, is of the highest authority when freely made, even in answer to questions(*t*). But even before 11 & 12 Vict. c. 42, which regulates magisterial procedure, the magistrate had no right to examine an accused person in the same manner as a witness, and if he did so the prisoner's answers could not be used against him(*u*).

Confession by
statements
made before
justices.

The mode of taking the statements of prisoners, made before the justices, is pointed out by the 11 & 12 Vict. c. 42, s. 18, which enacts, that after the examinations of all the witnesses for the prosecution "the justice of the peace, or one of the justices, by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so; but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial.' And whatever the prisoner shall then say in answer shall be taken down in writing and read over to him, and shall be signed by the said justice or justices and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards, upon the trial of the said accused person, the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not, in fact, sign the same: provided always, that the said justice or justices, before such

(*r*) 4 Bla. Com. 357.

(*s*) *R. v. Baldry* (1852), 21 L. J. M. C. 130.

(*t*) *R. v. Ellis* (1826), R. & M. N. P. C. 432.

(*u*) *R. v. Wilson* (1817), Holt, N. P. 597.

Second
caution by
justice.

accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt; but that whatever he shall then say may be given in evidence against him upon his trial notwithstanding such promise or threat: provided, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged made at any time, which by law would be admissible as evidence against such person."

The 28th section of the Act enacts, that "the several forms in the schedule to this Act contained, or forms to the same or the like effect, shall be deemed good, valid, and sufficient in law"; and it has been held, that a statement taken before a magistrate in the form prescribed by the schedule, and signed by the prisoner and the magistrate, is admissible evidence at common law; and where there has been no previous threat or inducement it is admissible under the statute, without proof of the second caution having been given; but it is prudent for justices to give the second caution as well as the first in all cases(*x*); but the section only applies to the concluding examination before the justices after all the witnesses for the prosecution have been examined, and does not apply to a voluntary statement made by a prisoner at any time during the course of the examination. And before the case for the prosecution is concluded, such statements may be proved by anyone who heard them, but most properly by the magistrate's clerk, who may refer to his own written memoranda, if necessary, to refresh his memory(*y*).

If a confession by a prisoner, purporting to be signed by a magistrate, has been duly returned to the judge, and has on the face of it the statement that the first caution has been given, it is admissible itself in evidence by the statute without any further proof(*z*).

If the authentication be incomplete, as if the prisoner having made his statement the magistrate neglects to sign it(*a*); or if by inadvertence it is not tendered for signature; and even if it be clearly shown that it was never reduced into writing at all: what the prisoner said at his examination may be received on the evidence of the above facts from parties

(*x*) *R. v. Sansome* (1850), 19 L. J. M. C. 143; *R. v. Bond* (1850), 19 L. J. M. C. 138.

(*y*) *R. v. Stripp* (1856), 25 L. J. M. C. 109; *R. v. Bond, ubi sup.*; *R. v. Sansome, ubi sup.*; *R. v. Wilkinson* (1838), 8 C. & P. 662; *R. v. Bell* (1831), 5 C. & P. 162; *R. v. Jones* (1828), Carr. Cr. L. 13.

(*z*) *R. v. Sansome, sup.*

(*a*) *R. v. Lambe* (1791), 2 Lea. 552, 555.

present, though subject in the last case to all the deductions in point of authenticity and weight which the circumstances occasioning its imperfection may imply (*b*).

But before oral evidence of a confession made on examination before a magistrate can be received at all, it must be affirmatively shown that the statement was not reduced into writing; because, if it was, such writing must be produced, and the court will not, in its absence, admit oral evidence; and it is presumed, until the contrary is shown, that the magistrate did his duty and took down the prisoner's statement in writing as required by the statute (*c*). Parol evidence may in general be given of what the prisoner said, if proved to have been omitted from an examination signed by the magistrate (*d*). If an oath has been inadvertently administered to the prisoner before he confessed, no statement made by him on that occasion can be used against him (*e*).

Proof of statements made by prisoner on the examination before the justices.

It is for the judge to decide upon the admissibility or inadmissibility of a confession made after an alleged inducement, and if the confession were rightly admitted in the first instance and taken down by him as evidence, but proof was afterwards given that inducement, such as to exclude the confession, had been in truth made, he ought to strike the evidence out of his notes (*f*). A confession made after a statement, in the presence of the prisoner's mistress and her husband, by a medical man, that it would be better for the prisoner to speak the truth, is inadmissible (*g*).

A statement made under oath by the prisoner, as a witness,

Previous statements made on oath.

(*b*) *R. v. Lambe* (1791), 2 Lea. 552, 555; *R. v. Wilkinson* (1838), 8 C. & P. 662; *R. v. Reed* (1829), M. & M. 403. The ruling of Abinger, C. B., to the contrary in *R. v. Waller* (1836), 7 C. & P. 267, is inconsistent with the other authorities, and must be treated, it is submitted, as having been made *per incuriam*.

(*c*) *R. v. Jacobs* (1784), 1 Lea. 310; *R. v. Fearshire* (1779), *id.* 202; *Phillips v. Wimburn* (1830), 4 C. & P. 273.

(*d*) *R. v. Harris* (1832), 1 Moo. C. C. 333. But where, on the examination before the magistrate of several persons charged with felony, the magistrate's clerk, in taking down their statements, had left a blank where either had mentioned the name of another of them, Patteson, J., refused to allow them to be supported by parol evidence of the clerk as supplementary evidence: *R. v. Morse* (1838), 8 C. & P. 605.

(*e*) 1 Hale, 585. In *R. v. Smith* (1816), 1 Stark. N. P. C. 242, where an examination of a prisoner taken in writing purported to have been taken on oath, Le Blanc, J., refused to admit evidence to show that the party was *not* sworn. In *R. v. Pikesley* (1839), 9 C. & P. 124, where the magistrate returned with the depositions, that "prisoner was sworn, and made a statement," this statement was rejected by Parke, B., though a witness swore the prisoner was *not* in fact sworn. Where a prisoner was sworn by mistake, but as soon as it was discovered the deposition was destroyed, his subsequent statement was admitted: *R. v. Webb* (1831), 4 C. & P. 564.

(*f*) Russ. on Cri., Ed. Greaves, 4th ed. 418; *R. v. Garner* (1848), 18 L. J. M. C. 1.

(*g*) *R. v. Garner*, *ubi sup.*

voluntarily, in the course of a judicial proceeding, is admissible, *e.g.*, the voluntary examination of a person under oath before a coroner (*h*). And so if the disclosure is made compulsory by statute and lawful, and the deponent is not protected from the consequences of his answers, his statements are admissible evidence against him (*h*), *e.g.*, the examination of a bankrupt (*i*) before the bankruptcy court upon which, under the statutes relating to bankruptcy, a bankrupt cannot refuse to answer questions otherwise proper on the ground that his answers may incriminate him, and under which statutes such answers are admissible in evidence against him.

Confessions to
persons not
magistrates.

Confessions to gaolers, constables, clergymen, or persons holding no office, are also admissible when freely made (*k*); though of course not so decisive as confessions regularly taken before a magistrate, and deliberately signed by the prisoner. The same rule applies to all; that if there be any ground to believe they were obtained by the influence of hope, or the fear of temporal consequences excited by the party obtaining them, such person having any authority in the matter, they cannot be heard; and it seems to lie on the prosecution to satisfy the judge that the confession was not the consequence of any inducement or threat (*l*). On this subject the law has proceeded to a scrupulous nicety, which the good sense of the judges has recently inclined to restrain, and which certainly should be carried no further. Thus, if a prosecutor or a constable say to a prisoner: "I only want my money, and if you will give me that you may go to the devil, if you please" (*m*); "If you do not tell me who your partner was, I will commit you to prison as soon as we get to N." (*n*); "You had better tell the truth;" or "It will be worse for you if you do not confess;" not a word said afterwards on the same occasion can be heard (*o*). So a confession induced by the expression, "Unless you give me a more satisfactory account, I will take you before a magistrate;" or "Tell me where the things are, and I will be favourable to you," cannot

(*h*) *R. v. Scott* (1856), 25 L. J. M. C. 128; *R. v. Robinson* (1867), L. R. 1 C. C. R. 80; *R. v. Tubby* (1833), 5 C. & P. 530; *R. v. Lewis* (1835), 6 C. & P. 161; *Smith v. Beadnell* (1807), 1 Camp. 30; *dictum* of Tindal, C. J., in *R. v. Gilham* (1828), 1 Moo. C. C. 203.

(*i*) See the recent case of *R. v. Pike*, [1902] 1 K. B. 552, where a statement of affairs prepared by a debtor in the course of his bankruptcy under sect. 16 of the Bankruptcy Act, 1883, is held admissible in evidence against him on a charge under 24 & 25 Vict. c. 96, s. 80, of misappropriation of money of which he was a trustee.

(*k*) *R. v. Baldry* (1852), 21 L. J. M. C. 130.

(*l*) *R. v. Warringham* (1851), 2 Den. C. C. 447, *per* Parke, B.

(*m*) *R. v. Jones* (1809), R. & Ry. 152.

(*n*) *R. v. Parratt* (1831), 4 C. & P. 570.

(*o*) 2 East, P. C. c. 16, s. 94, p. 659.

be received at all (*q*). A simple exhortation to an accused to "tell the truth," if he says anything, ought not to exclude the confession (*r*); but if he is told that it will be better for him to speak the truth, the subsequent confession may be inadmissible (*s*); but, whatever the words used, it is for the judge to consider whether they of themselves, or coupled with the manner adopted, import an exhortation only, or an inducement to confess (*t*). But it is now settled, that inducements held out at one time will not invalidate a confession made at a subsequent time, if the expectation raised by the inducement at the former time has been effaced at the time of the subsequent statement, whether before a magistrate or to any other party, as a constable (*u*). And it has been further held, that if the confession is induced by some person who has no concern in the business, and who has nothing to do with the apprehension or prosecution of the accused, and has no authority or semblance of authority to extend mercy, but who officiously advises the party to confess: this will not invalidate the confession, though it would be otherwise if the party giving the advice were the prosecutor, the constable, or the magistrate (*x*); but a bystander who holds out an inducement, in the presence of a person having authority, as the prosecutor, or his wife, &c., without any expression of dissent, must be taken to act with the sanction of such persons, and a confession made thereupon is not admissible (*y*); but whether the person holding out the inducement is to be deemed to

(*q*) *R. v. Thompson* (1783), 1 Lea. 291; *R. v. Cass* (1784), *id.* 293, n. (*a*).

(*r*) *R. v. Moore* (1852), 2 Den. C. C. 522; *R. v. Parker* (1861), 30 L. J. M. C. 144; *R. v. Steeman* (1853), Dears. C. C. 249; *R. v. Holmes* (1843), 1 C. & K. 248; *R. v. Court* (1836), 7 C. & P. 486.

(*s*) *R. v. Garner* (1848), 18 L. J. M. C. 1; *R. v. Baldry* (1852), 21 L. J. M. C. 130.

(*t*) *R. v. Garner*, *ubi sup.*

(*u*) *R. v. Lingate* (1815), 1 Taylor on Ev. s. 802; *R. v. Rosier* (1821), *id. ibid.*

(*x*) *R. v. Row* (1809), Russ. & Ry. 153; *R. v. Gibbons* (1823), 1 C. & P. 97; *R. v. Tyler* (1823), *id.* 129; *R. v. Taylor* (1839), 8 C. & P. 733, *per* Patteson, J. It is the opinion of the judges that evidence of any confession is receivable, unless some inducement has been held out by some person *in office or authority*. ["*Office*" applies to magistrates, gaolers, constables, &c.; "*authority*," to parties having power over prisoner, as master, &c.]

L.'s house had been on fire. Prisoner, a female servant of L., was sent for into the parlour, where W., a person *not in office or authority*, said to prisoner, in the presence of the wife of L.: "You had better tell how you did it." She made an answer;—but it was rejected by Patteson, J., because Mrs. L., prosecutor's wife and prisoner's mistress, was present; and, as she expressed no dissent, must be taken to have sanctioned the inducement, which inducement must be taken as if it had been held out by a person in authority over the prisoner. *S. C.*

(*y*) *R. v. Taylor* (1839), 8 C. & P. 733; *R. v. Laughor* (1846), 2 C. & K. 225; *R. v. Luckhurst* (1853), 1 Dears. C. C. 245; *R. v. Garner* (1848), 18 L. J. M. C. 1; *R. v. Upchurch* (1836), 1 Moo. C. C. 465.

have the authority of the person in authority, though no dissent is expressed, depends upon the special circumstances of the occasion, and the evidence has been admitted in many cases (z). Where an inducement is held out by a person in authority it will render a confession inadmissible, though such confession is not made for some days, and though the prisoner may in the meantime have been discharged by a magistrate for want of evidence. The question in such cases would seem to be whether the inducement in fact operated on the prisoner's mind when he confessed (a). And it is no ground for excluding a confession, that it was induced by the admonitions of a clergyman as to the religious duty of confession; for such admonitions could scarcely tend to produce falsehood, the danger of which is the only reason for excluding confessions at all; and the hopes and fears which the law contemplates are hopes of temporal advantage, and fears of punishment in this world, not considerations relating to pardon or suffering in another state of being (b).

If an inducement to confess is held out, but that inducement is effectually withdrawn or neutralised before any confession is made, the confession will be admissible; *e.g.*, where a magistrate urged a prisoner to confess by promising that if he would do so he (the magistrate) would use his influence to obtain a pardon, but, before any confession made, the magistrate acquainted the prisoner with the contents of a letter which he had received from the Home Secretary, to the effect that if the prisoner was found guilty no hope whatever of pardon or mitigation could be entertained, and some time after this the prisoner made a confession to the coroner, it was held to be admissible, all hope having been effectually destroyed by the terms of the Home Secretary's letter (c).

Discoveries made, or acts done, in consequence of a confession unduly obtained, may always be given in evidence, with so much of the prisoner's statement as led to those discoveries or acts, without his acknowledgment of guilt (d). Thus, where a prisoner's statement was inadmissible in evidence, but described a lantern as being in a particular place, or stolen property to be in the sacking of his bed, which proved to be the fact, it was held that a witness might be examined whether the prisoner had said anything about the lantern, and whether in consequence thereof it was searched for and found (e); and declarations of an accused accompany-

(z) *R. v. Parker* (1861), 30 L. J. M. C. 144.

(a) *R. v. Hewett* (1842), C. & M. 535.

(b) *R. v. Gilham* (1828), 1 Moo. C. C. 186.

(c) *R. v. Cleves* (1830), 4 C. & P. 221.

(d) *Warickshall's case* (1783), 1 Lea. 263; and see 2 Stark. Ev. 27, 2nd ed.; *R. v. Jenkins* (1822), R. & Ry. 492.

(e) *Warickshall's case*, *ubi sup.*; *R. v. Leatham* (1861), 8 Cox, 498; *R. v. Gould* (1840), 9 C. & P. 364; *R. v. Lockhart* (1785), 2 East, P. C. 658.

ing his acts are evidence, though inadmissible as a *confession*; accordingly, where the prisoner was indicted for stealing a guinea and two bank notes, and the prosecutor improperly induced him to confess, in consequence of which inducement the prisoner brought to the prosecutor a guinea and a five-pound note, which he gave up to the prosecutor as being the guinea and one of the stolen notes, the words used by the prisoner at the time of handing over the guinea and note to the prosecutor were held admissible, although a mere confession would not have been (*f*). A letter given to the gaoler by a prisoner to put into the post for his father, upon the promise of the gaoler that he would post it, has been received as evidence against him, though the gaoler forwarded it to the visiting justices, who handed it to the prosecutor (*g*); but the practice of obtaining evidence in such a manner is open to observation.

Confessions, oral or written, are only evidence against the party confessing, not against others indicted with him (*h*), unless they were present when he made his statement, and by any word, or act, may be fairly considered as expressing assent to its truth (*i*). For the mere silence of a party charged with an offence, while another person making a confession in his hearing implicates him as a sharer in it, does not make that confession evidence against him (*i*); as it is not to be presumed that a prisoner, in the presence of a magistrate, would feel at liberty to interrupt the person under examination as he might have done in ordinary conversation (*i*); nor, upon an indictment against an accessory, is a confession by the principal admissible to prove even the guilt of the principal, but the commission of the crime by the principal must be proved *aliunde*, even though the confession of the principal was made by him in the presence of the accessory (*k*).

The prisoner is always entitled to have the whole of any paper produced against him, and the whole of any conversation in which he took part, to part of which the prosecutor

Whole statement.

(*f*) *R. v. Griffin* (1809), R. & Ry. 151; see 2 Stark. Ev. (2nd ed.) 28.

(*g*) *R. v. Durrington* (1826), 2 C. & P. 418.

(*h*) 1 Hale, 585; 2 Hawk. c. 46, s. 3; but a letter from a prisoner read as a confession must be read without omissions, though it mention the names of the other prisoners: *R. v. Fletcher* (1829), 4 C. & P. 250; *R. v. Clewes* (1830), *id.* 221. So a witness who speaks to a conversation, in which the prisoner said something which implicates another prisoner, must not omit the name of that other prisoner, but must give the conversation exactly as it occurred: *R. v. Hearne* (1830), *id.* 215. In both cases the judge will tell the jury that the letter, or the declaration of the one prisoner, is not evidence against any one but himself. This rule prevails, even though the prisoner might have cross-examined.

(*i*) *R. v. Appleby* (1821), 3 Stark. N. P. C. 33; *J. Kelynge*, Resol. 5, in *R. v. Tong*, pp. 17, 18. See *R. v. Hervey* (1782), 1 Lea. 235; *Melen v. Andrews* (1829), Moo. & M. 336.

(*k*) See by twelve judges in *R. v. Turner* (1832), 1 Moo. C. C. 347; *R. v. Thomas Reilly* (1787), 1 Leach, 454, note.

examines, submitted to the jury (*l*). And though the prosecutor is at liberty to show that any part of the statement so made is false, either by direct proof, or by showing facts with which it is incompatible, yet, if there be nothing to impugn it in the case, the jury ought to give weight to the whole, and acquit, if its statement so adduced warrants such acquittal (*m*). Where a prisoner charged with larceny has given two different accounts of the way in which he became possessed of the stolen property, it is not incumbent on the prosecutor to call as witnesses persons whom, in one of the statements, he says could prove his innocence, with a view of disproving that statement; but it may be prudent for the prosecutor to have these persons in attendance at the trial, although he does not call them, to avoid the effect of observations by the prisoner or his counsel that these persons could prove his innocence, but that he has not the means of procuring their attendance (*n*).

SECTION 6.

OF CONFINING EVIDENCE TO A SINGLE FELONY, VIZ., ELECTION BY PROSECUTOR.

Confusion has frequently arisen from want of a clear understanding of the practice of calling on the prosecutor, who has preferred various charges of felony, to elect that precise charge on which he will proceed, and offenders have sometimes altogether escaped punishment, from the mere circumstance that they have committed several offences so connected that it was impossible entirely to sever one from the others. It is, therefore, important to ascertain precisely what the rule is, and in what manner it ought to be applied in practice. The only rule of *law*, strictly speaking, on this subject is, that *all evidence must be relevant to the issue*, and, therefore, it is not competent to the prosecutor to blacken the general character of the prisoner by showing that he committed a crime for which he is not indicted, and which forms no part of the transaction which is the subject of inquiry.

We have seen that, in point of law, the joinder of several felonies in one indictment is not liable to objection; and, in fact, every count purports on the face of it to contain a distinct charge (*o*); however, in trials for felonies, as soon as

Prosecutor
put to elec-
tion, when.

(*l*) *The Queen's case* (1820), 2 Brod. & Bing. 297.

(*m*) *R. v. Jones* (1827), 2 C. & P. 630.

(*n*) *R. v. Dibley* (1849), 2 C. & K. 818.

(*o*) *Ante*, p. 149.

it distinctly appears from the prosecutor's opening, or at any other part of the trial, that the matters charged constitute technically or actually separate felonies (*q*), it has been the practice for judges, in their discretion (*r*), to confine the prosecutor's evidence to a single transaction, lest the prisoner should be surprised or embarrassed in his defence by a variety of charges. But the principle on which this practice rests is entirely forgotten, when this discretion of the court is applied to prevent the full proof of one connected transaction involving the felony charged, because in such transaction *another felony is involved*, which must also appear in proof if the whole transaction is sifted. Accordingly, the better considered and more recent decisions all show that the prosecutor may prove everything necessary to elucidate a single charge, although in so doing he must show other felonies as a medium of proof. Thus, where the prosecutor, suspecting the prisoner, had put marked money into his till, and caused him to be watched, the prosecutor was suffered to prove several visits to the till by the prisoner, several inspections of the till consequent upon those visits, and the several results of those inspections, viz., that the money was each time reduced. It was objected that the prosecutor should have been confined to proof of a single felony. But the Court of King's Bench refused to stay the judgment on that ground, saying that the judge had a discretion to allow evidence of several felonies when they formed part of one transaction (*s*). In his judgment Mr. Justice Holroyd mentioned a case (*t*) in which, at a trial for robbery effected by a threat of a shocking accusation, he allowed evidence of an attempt by the prisoner at another time to obtain other property of the prosecutor by means of a similar threat; and the judges, on the point being stated to them, agreed that he was warranted in receiving the proof. Evidence even of three distinct burglaries, when necessary to the history of one, has been received, and the admission of the proof had the high sanction of Lord Ellenborough's approval (*u*); and in a case on a charge of attempting to obtain money from a pawnbroker by false pretences, in order to show the guilty knowledge of the defendant, the prosecution was allowed to prove previous attempts at other towns and on other days to obtain money from other pawnbrokers by false pretences of a somewhat similar nature (*x*). So, on an indictment for murder by a

Several distinct felonies may be proved if involved in felony charged.

In false pretences.

(*q*) *R. v. Dunn* (1826), 1 Moo. C. C. 146; *R. v. Smith* (1827), 2 C. & P. 633.

(*r*) See *R. v. Galloway* (1829), 1 Moo. C. C. 234. See *per* Pollock, C. B., *R. v. Moak* (1858), 27 L. J. M. C. 204.

(*s*) *R. v. Ellis* (1826), 6 B. & C. 145.

(*t*) *R. v. Egerton* (1819), R. & Ry. 375.

(*u*) *R. v. Wylie* (1804), 1 B. & P. N. R. 92.

(*x*) *R. v. Francis* (1874), 43 L. J. M. C. 97.

In larceny.

woman of her husband with arsenic, evidence was given that arsenic had been found in the body of the husband after death, and that two sons of the prisoner had subsequently died, and that arsenic also had been found in their bodies after death, and that another son had been taken ill, but had recovered, and that arsenic had also been administered to him ; that the symptoms in the four cases were the same ; and that the prisoner lived in the same house and prepared their tea and cooked their victuals. And it was held that the evidence was admissible to enable the jury to determine whether the taking of the arsenic by the husband was accidental or not ; and notwithstanding that it might have a tendency to prove or create a suspicion of a subsequent felony (*y*). So, in a case where the prisoner was charged with stealing a thousand cubic feet of gas on a particular day, and the evidence showed that on that day, and daily afterwards for two years, the prisoner had caused an abstraction of gas from the main of the prosecutors, by a pipe which conducted the gas to a mill of the prisoner without its passing through any meter : it was held that the circumstances attending the abstraction of the gas during the whole of that time were rightly given in evidence, and that the prosecutors were not put to their election of any three or any one particular taking (*z*). And again, in the case of a lessee of a coal mine, who by the working of his own colliery abstracted, for some years, the coal of many adjoining proprietors, it was held by Erle, J., that as long as the coal was gotten from one shaft it was one continuous taking, though the working was carried on by means of different levels and cuttings and into the lands of different people ; and for the purpose of showing felonious intent evidence was admitted to prove that the prisoner went out of his boundary in other instances and into the property of many other persons (*a*).

It would seem that where, in order to prove guilty knowledge on the part of the prisoner, the prosecution tender in evidence facts which constitute a separate transaction, and which are themselves the subject of a separate indictment remaining to be tried, the court will exclude the evidence (*b*). Vaughan, B., ruled to this effect in a case where the prisoner was indicted for uttering a forged Bank of England note, knowing it to be forged. Evidence being tendered of the uttering by the prisoner of a similar note to another person in order to show guilty knowledge, for which second uttering the prisoner also stood indicted, Vaughan, B., said : " I think,

(*y*) *R. v. Geering* (1849), 18 L. J. M. C. 215.

(*z*) *R. v. Firth* (1869), 38 L. J. M. C. 54. See as to larceny of gas, *R. v. White* (1853), Dears. C. C. 203.

(*a*) *R. v. Bleasdale* (1848), 2 Car. & K. 765.

(*b*) *R. v. Salisbury* (1831), 5 C. & P. 155.

as the second uttering is made the subject of a distinct prosecution, we are not at liberty to go into evidence of it, even to show a guilty knowledge in a previous uttering. Other utterings, for which no prosecution had been commenced, have been held to be evidence to show a guilty knowledge. But I am of opinion that if the prosecutors have made the second uttering the subject of a substantive charge, I cannot receive evidence of it in support of the present indictment" (c); and Patteson, J., acted in accordance with this, and refused to receive such evidence unless the prosecutor of the other indictment would consent to an acquittal thereon (d). But where the facts sought to be given in evidence are material to be proved, and form part of the facts of the case, and do not constitute or form part of a separate and distinct transaction, the circumstance that there is another indictment remaining to be tried founded upon such facts affords no sufficient reason for excluding them (e). And where there are two indictments by the same prosecutor against the same prisoner for perfectly distinct offences, arising out of the same transaction, the court will not, upon the prisoner being arraigned upon one of such indictments, order the prosecutor to abandon the other; *e.g.*, where one indictment is for shooting at a gamekeeper, and another indictment is for night poaching (f). It is *submitted* that the protection afforded by the right to plead *autrefois acquit* or *autrefois convict*, where those pleas are appropriate, is, in such cases, all the protection which the prisoner can require or is entitled to. It is also *submitted* that the rule of exclusion, where another indictment is pending, above mentioned, is a rule for the guidance of the judicial discretion of the presiding judge, and not a rule of law, and that a convicted prisoner could not take advantage of the admission of such evidence, upon arrest of judgment, or writ of error, or otherwise.

It is completely settled that on an indictment for uttering forged notes or counterfeit coin, the prosecutor may give evidence of other utterings of similar notes or coin, though they are not charged on the record, as evidence of guilty knowledge (g). In coinage offences.

A subsequent uttering to the one charged of a coin of a different denomination is evidence to prove guilty knowledge at the time of the uttering charged (h). And on a charge of feloniously and knowingly, and without lawful excuse, having in his custody and possession a mould impressed with the figure of the obverse side of a half-crown, evidence that the

(c) *R. v. Smith* (1827), 2 C. & P. 633.

(d) *R. v. Westwood* (1831), 4 C. & P. 547.

(e) *R. v. Salisbury* (1831), 5 C. & P. 155.

(f) *R. v. Hanaley* (1833), 5 C. & P. 565.

(g) *R. v. Ball* (1807), R. & Ry. 132.

(h) *R. v. Forster, al. Foster* (1855), 24 L. J. M. C. 134.

prisoner had, thirteen days before, passed a bad half-crown, though not shown to have been made in the mould in question, was held admissible to show the guilty knowledge(*i*). In that case there was another indictment against the prisoner for the uttering, upon which he was afterwards tried and convicted(*k*).

In embezzlement.

In a case of embezzlement, where the books of a society, kept by the prisoner, were given generally in evidence by the prosecution, though it was objected on behalf of the prisoner that the evidence must be confined to the three particular entries referred to in the three charges in the indictment, the conviction was sustained(*l*).

Proof of distinct acts of receiving stolen goods.

In an indictment for embezzlement, which charged that on three several occasions within six months the prisoner entered in books payments made by him correctly, but in adding up the items made the totals greater than they really were, and took credit with his employers for the larger amount: at the trial evidence was tendered that on a series of occasions, before and after those mentioned in the indictment, precisely similar errors had been made by the prisoner and advantage taken of them by him; and it was held by Willes, J., that the evidence was admissible to explain motives and intentions, and to show that the errors in the cases in the indictment were not the consequence of mistake(*m*). And where a number of articles are found in the prisoner's possession, the mere probability that he stole them at different times is no ground for requiring the prosecutor to confine his evidence to one of them, if nothing shows that they might not have been stolen at one time(*n*). And though, on an indictment for receiving, if it distinctly appear that articles were received at different times, the prosecutor may be required to elect on which act of receiving he will found his case, he may still give evidence of the other receivings as proof of guilty knowledge(*o*).

Now, by 34 & 35 Vict. c. 112, s. 19, where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken

(*i*) *R. v. Weeks* (1861), 30 L. J. M. C. 141.

(*k*) *Ibid.*

(*l*) *R. v. Proud* (1861), 31 L. J. M. C. 71.

(*m*) *R. v. Richardson* (1861), 8 Cox, 448.

(*n*) *R. v. Dunn* (1826), 1 Moo. C. C. 146; *R. v. Johnson* (1857), 27 L. J. M. C. 52.

(*o*) *R. v. Dunn. sup.*

against him. And this practice is aimed at by the 24 & 25 Vict. c. 96, s. 6, which enacts, that "if upon the trial of any indictment for larceny it shall *appear* that the property alleged to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings."

And by 24 & 25 Vict. c. 96, s. 92, "in any indictment containing a charge of feloniously stealing any property it shall be lawful to add a count or several counts for feloniously receiving the same, or any part or parts thereof, knowing the same to have been stolen; and in any indictment for feloniously receiving any property knowing it to have been stolen, it shall be lawful to add a count for feloniously stealing the same: and where any such indictment shall have been preferred and found against any person the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty either of stealing the property or of receiving the same, or any part or parts thereof, knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property or of receiving the same, or any part or parts thereof, knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same, or any part or parts thereof, knowing the same to have been stolen."

And by sect. 71, "for preventing difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or disposition *hereinbefore* mentioned (*p*), it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against her Majesty or against the same master or employer within the space of six months from the first to the last of such acts." Where it was the duty of an agent of a coal society to collect and receive from persons who bought coals from the society, for which they were to pay by weekly instalments such weekly

(*p*) *I.e.*, by clerks or servants, and by persons in the King's service, or in the police. (Sects. 67—70.)

payments, and to send in a weekly account on the Tuesday of every week, and on such Tuesday to pay the gross amount received by him in the course of the week into a bank to the credit of the society: an indictment for embezzlement against the agent contained three counts, and charged in the first count the act of embezzling the sum of 1*l.* 1*s.*; and evidence was given on that count that during a certain week payments amounting in the whole to this amount had been made to the prisoner by ten different persons in small sums, and that the prisoner omitted to account at the end of the week, or at any time, for those several sums or for any specific amount of 1*l.* 1*s.* In the other two counts sums were charged, being aggregate sums similarly composed and received weekly, but not accounted for weekly in a similar manner, and thirty-one small sums in all were thus shown not to have been accounted for at three weekly accountings: it was held that the evidence was properly received, and the indictment did not charge more than three distinct acts of embezzlement—each act of embezzlement being the omission to account weekly for the aggregate sum composed of the several sums received during the week (*q*).

The prosecutor may, as it seems, be called on to make this election at any part of the trial; but if the judge refuse the prisoner's request that he may do so, it will not invalidate the conviction. This was the opinion of all the judges in a case where the same parties were charged in one count as principals in larceny, and in another as receivers; though they were equally divided in opinion whether or not, in point of discretion, the prosecutor should have been put to his election (*r*).

The practice of confining the evidence to a single transaction was always limited to felonies. In misdemeanours, several distinct offences, as assaults and libels, if charged separately in the indictment, may all be proved at the trial (*s*).

Previous conviction may be given in evidence, when.

Except in the case provided for by 34 & 35 Vict. c. 112, s. 9 (*infra*), a previous conviction of a prisoner is not to be given in evidence to a jury on a case before them, unless evidence to his character is given, and such evidence is given within the meaning of that rule, when it is elicited upon cross-examination of a witness for the prosecution by the prisoner or his counsel (*t*).

By the 24 & 25 Vict. c. 96, s. 116, in any indictment for any offence *punishable under this Act*, and committed after a previous conviction or convictions for any felony, misdemeanour, or offences punishable upon summary conviction, it shall be sufficient, after charging the subsequent offence, to

(*q*) *R. v. Balls* (1871), L. R. 1 C. C. R. 328.

(*r*) *R. v. Galloway* (1829), 1 Moo. C. C. R. 234.

(*s*) *Ante*, p. 151; *R. v. Jones* (1809), 2 Campb. 132.

(*t*) *R. v. Shrimpton* (1851), 21 L. J. M. C. 37; and see *ante*, p. 243, note (*g*).

state that the offender was previously convicted of felony, &c., and the procedure thereupon is provided; and then it is provided, that if, upon the trial of any person for any such subsequent offence, such person shall give evidence of his good character, it shall be lawful for the prosecutor, *in answer thereto*, to give evidence of the conviction of such person *for the previous offence* or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence. And there is a similar enactment as to indictments for offences against the Coinage Act, 24 & 25 Vict. c. 99, after a previous conviction against any act relating to coin (*u*).

By 34 & 35 Vict. c. 112, s. 19, where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then if such person has, within five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration, for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen: provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary, for the purposes of this section, to charge in the indictment the previous conviction of the person so accused.

Evidence of previous conviction to show guilty knowledge of receiver of stolen goods.

SECTION 7.

OF THE NECESSITY OF PRODUCING THE BEST EVIDENCE WHICH APPEARS TO BE IN EXISTENCE.

It is a general and invariable rule of evidence, both in civil and criminal cases, that whether the proof be offered on the part of the prosecution or of the defence, the best evidence must be produced of which the nature of the case will allow (*x*). The meaning of this rule is, not that the greatest quantity of proof which might be obtained shall be imperatively required, but that nothing shall be admitted as proof, which, being in its own nature secondary, implies the existence of primary proof, unless it be shown that such primary proof is destroyed, or is out of the reach of the party desiring to use it. Thus, in general, where matter in writing is to be proved, no secondary evidence can be admitted, *i.e.*, no copy can be read, or oral evidence of its contents given, till it has been either proved

The best evidence must be produced.

Secondary evidence is not admissible till the absence of primary evidence is accounted for.

(*u*) 24 & 25 Vict. c. 99, s. 37.

(*x*) Bull. N. P. 293; 1 Taylor on Ev. 9th ed. § 217.

Where writing only one means of evidencing a fact other means, *e.g.* by parol, are equally admissible.

No degrees of secondary evidence.

Intestacy.

that the original is lost, or is in the possession of the adversary; and further, that the party who offers the copy has done all in his power towards the production of the original, in the first case by making diligent search for it, and in the last by giving a timely notice to produce it. However, where the writing is not itself the fact to be proved, but is only one means of evidencing a fact, *other* means of proof may be at once adopted. Thus, the payment of money may be proved by a witness who saw it paid, or to whom the party receiving it has admitted the payment, although a receipt was given at the time (*y*). Resolutions passed at public meetings, or meetings of directors, &c., by being entered in books which are made evidence, are not excluded from proof by parol (*z*). The inscription on a monument may be proved by parol (*a*). And if several persons are present at the same transaction, and one of them only makes a memorandum to refresh his memory, the evidence of the witnesses who made no memorandum will not be excluded (*b*). So the fact of partnership may be proved by the acts of the parties, though there be a deed of partnership not produced (*c*); and a marriage by persons who were present at and witnessed the ceremony, or by reputation, though there be an entry in the parish register not produced (*d*). But there are no *degrees* in secondary evidence; and where it is admissible at all, any species of it in the party's power may be given (*e*). Thus, shorthand writer's notes of the contents of a deed as read at a former trial between the same parties are evidence, though a copy exists. Where attestation is necessary to the validity of an instrument, the attesting witness must be called; but it is never necessary in point of law to call more than one, although there may be three names on the face of the instrument (*f*); but where attestation is not requisite, it is not necessary to prove the instrument by the attesting witness; but it may be proved by admission or otherwise as if there had been no attesting witness thereto (*g*).

It is sufficient proof of intestacy to prove an unsuccessful search for a will in the drawers and boxes of the deceased (*h*).

(*y*) *Rambert v. Cohen* (1802), 4 Esp. 213; *Jacob v. Lindsay* (1801), 1 East, 460; and see 8 C. & P. 14.

(*z*) *Miles v. Bough* (1842), 3 Q. B. 845, 872; *Inglis v. Great Northern Rail. Co.* (1852), 1 Macq. at p. 118.

(*a*) *Doe v. Cole* (1834), 6 C. & P. 359.

(*b*) 2 Stark. Ev. 2nd ed. 922.

(*c*) *Alderson v. Clay* (1816), 1 Stark. 405.

(*d*) *Erans v. Morgan* (1832), 2 Cr. & J. 453.

(*e*) *Doe d. Gilbert and others v. Ross* (1840), 7 M. & W. 102. A party having a lien on a deed refused to produce it on subpoena. A copy was produced and rejected, because, though attested, it had no stamp. The contents of the deed were then proved by a shorthand writer's note of them, read at a former trial; nor need the copy have been produced at all, *S.C.*; see *Brown v. Woodman* (1834), 6 C. & P. 206.

(*f*) Bull. N. P. 264.

(*g*) 28 & 29 Vict. c. 18, s. 7.

(*h*) *R. v. Johnson* (1857), 27 L. J. M. C. 52; *Minshall v. Lloyd* (1837), 2 M. & W. 450.

Where the original of any document is lost, it must be shown that all reasonable search was made for it in the places where it is likely to be found. It is for the court to be satisfied that due diligence has been used to find the document, so as to raise the presumption of its loss (*i*). If the instrument be traced to the possession of a particular person, that person must be called, and it will not suffice to show an application to him for it, and his answer that he cannot find it (*j*). And where an individual is by law entitled to the custody of an instrument, it is absolutely necessary to call him to disprove the presumption that he possesses it (*k*); or if he is dead, to prove a search of his papers (*l*). If two parts of a deed be executed, the non-production of both must be accounted for, before secondary evidence can be given of either. And all the witnesses to an instrument, to which attestation is necessary, must be proved to be dead or abroad, or not producible on diligent inquiry, before evidence of the handwriting of any can be given; but when this is done, proof of attestation by one will suffice; and, except to show the identity of the party, it is never necessary to prove the handwriting of the principal executing (*m*).

Where an instrument is in the possession of a prisoner, notice to produce it must be given him as in a civil cause, or secondary evidence cannot be given (*n*). But this notice is not necessary where the nature of the charge implies that the instrument is in the possession of the prisoner, the instrument being the very object of the proceeding. Thus, on an indictment for stealing a security, parol evidence of its contents may be given without any notice to produce it (*o*). Again, on an indictment for forging a note, which the prisoner, on his apprehension, has swallowed or destroyed, no notice to produce is requisite; but on an indictment for perjury, alleged to have been committed in swearing that there was no draft in existence of a statutory declaration, it was not deemed sufficient evidence that the draft had come into the prisoner's possession, and that he was required to produce it (*p*). So a charge of arson, with intent to defraud an insurance office, is not a sufficient notice to produce, to let in secondary evidence of the policy of insurance (*q*). Inscriptions on banners used

Proof of loss
of document.

Notice to
produce, when
necessary.

When un-
necessary.

(*i*) See preceding note.

(*j*) *R. v. Castleton* (1795), 6 T. R. 236; see *R. v. Denio (Inhabs.)* (1827), 7 B. & C. 620; *R. v. Morton (Inhabs.)* (1815), 4 M. & S. 48; *Williams v. Younghusband* (1815), 1 Stark. 139.

(*k*) *R. v. Stoke Golding* (1817), 1 B. & A. 173.

(*l*) *R. v. Puddleinton (Inhabs.)* (1832), 3 B. & Ad. 460.

(*m*) *Whitelock v. Musgrave* (1833), 3 Tyr. 541; *Logan v. Alder* (1832), 3 Tyr. 557, n.; *Sewell v. Evans* (1843), 4 Q. B. 626; *Greenshields v. Crawford* (1842), 9 M. & W. 314.

(*n*) *R. v. Watson* (1788), 2 T. R. 201.

(*o*) *R. v. Aickles* (1784), 1 Leach, 294.

(*p*) *R. v. Elworthy* (1867), L. R. 1 C. C. R. 103.

(*q*) *R. v. Kitson* (1853), 22 L. J. M. C. 118.

at a meeting, on a charge of holding a seditious meeting, are admissible without notice to produce (*r*). The contents of a notice board affixed to the freehold and not easily removable may be proved by parol without notice to produce (*s*). If easily removable (*e.g.*, a printed notice hung on a nail), it must be produced (*s*). Where notice to produce is necessary, it may be by parol or in writing (*t*); if in writing, it should be intitled in the prosecution (*u*); and should express, if not with literal, at least with substantial accuracy, the document required, so as to leave no reasonable doubt which is meant. Notice to produce "all letters written by plaintiff to defendant relating to matters in dispute in the action," was held good, though no dates were given, because the names of the parties were mentioned (*x*). The mere fact of an instrument being in court, in possession of the adversary, will not justify the reception of secondary evidence, except *after* proper notice to him to produce it (*y*). But if the paper is admitted or proved to be in court, verbal notice to the party having it in his possession given in court is sufficient (*z*). A party who is protected from producing a deed will not be compelled to state its contents (*a*). If it is not shown that the instrument was ever in the prisoner's possession, no notice is necessary (*b*). The notice must be served either on the prisoner or his attorney, as in civil cases (*c*), in time sufficient to enable the prisoner to produce the paper (*d*), that is, before the first day of the sessions, if the prisoner reside at a distance from the sessions town (*e*), and if, in consequence of refusal to produce an

Notice to
produce, when
to be served.

(*r*) *R. v. Hunt* (1820), 3 B. & A. 566.

(*s*) *Bartholomew v. Stephens* (1839), 8 C. & P. 728; *Jones v. Tarleton* (1842), 9 M. & W. 675.

(*t*) *Smith v. Young* (1808), 1 Campb. 440.

(*u*) *Harvey v. Morgan* (1816), 2 Stark. N. P. C. 17.

(*x*) *Jacob v. Lee* (1837), 2 M. & Rob. 33.

(*y*) *Bate v. Kinsey* (1834), 4 Tyr. 662.

(*z*) *Dwyer v. Collins* (1852), 21 L. J. Ex. 225.

(*a*) *Davies v. Waters* (1842), 9 M. & W. 608.

(*b*) *R. v. Hood and others* (1830), 1 Moo. C. C. 281, 285. An officer called to produce a warrant under which he had acted, swore he lost it in the affray which ensued on his reading it at the offender's house, and had searched his pockets for it shortly after, while taking him to gaol, without finding it. A boy proved a search in the road between the house and the place where it was missed. No notice to produce, or search of the offender's house, was proved. Vaughan, B. admitted secondary evidence.

(*c*) *Attorney-General v. Le Merebant* (1772), 2 T. R. 201, n.; *Houseman v. Roberts* (1832), 5 C. & P. 394, Gurney, B.

(*d*) *R. v. Kitson* (1853), 22 L. J. M. C. 118; *Bryan v. Wagstaff* (1825), Ry. & M. N. P. C. 327; *Houseman v. Roberts*, *sup.*

(*e*) *Trist v. Johnson* (1833), 1 Moo. & Rob. 259. In *R. v. Ellicombe* (1833), *id.* 260, notice to produce was served on prisoner in gaol during an assizes, viz., on 18th. Trial on 20th. Prisoner's house was ten miles from assize town, and the services held too late. See *Byrne v. Harvey* (1838), 2 Moo. & Rob. 89; *Firken v. Edwards* (1840), 9 C. & P. 478; *Reg. v. Kitson*, *ubi sup.*: where service of notice in the middle of the day on the day before the assizes at the assize town, the prisoner's residence being thirty miles from the town, was held insufficient: *Houseman v. Roberts*, *sup.*

original document after notice, secondary evidence of it is given, it is too late for the party who has refused to produce it to put in the original (*f*).

It follows as a plain example of this rule, that *hearsay*, Hearsay. that is, the statement of some third person, whether oral or in writing is not to be received; because the party himself who is represented as making the assertion might be called to prove it on his oath. But the fact of a recent complaint made in case of rape may be given in evidence as a part of the transaction, to sustain the prosecutrix in her story, though not to establish the particulars of her narrative (*g*); and it is now clearly established that upon the trial of an indictment for rape, or other kindred offences against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as negating consent on her part (*h*). But where a person indecently assaulted makes a complaint, not of her own initiative, but in answer to a question, the particulars of such complaint, though otherwise admissible within the rule in *R. v. Lillyman* (*supra*), cannot be given in evidence (*i*). Expressions used in the course of a transaction may be proved as part of it, though not as showing any independent fact which might be deposited to by competent witnesses (*j*). As dying declarations, viz., the statements of a party mortally injured, in the immediate prospect of death, are only admitted in trials for homicide (*k*), on account of the solemnity attached to the words of a man who believes himself dying, they do not fall within the scope of this work; but as to the admissibility in certain cases and under certain conditions of depositions of persons taken under 11 & 12 Vict. c. 42, and the examinations or depositions of persons taken under 30 & 31 Vict. c. 35, s. 6, see *post*, pp. 291, 293, "Depositions."

The previous statements of a witness relative to the transaction, whether made on oath or not, may be adduced to Previous declarations.

(*f*) *Doe d. Thompson v. Hodgson* (1840), 12 A. & E. 135.

(*g*) *R. v. Clarke* (1817), 2 Stark. N. P. C. 242; *R. v. Brazier* (1779), 1 East, P. C. 444; see *R. v. Osborne* (1842), C. & M. 622. *Semb.*, the terms in which the complaint was made cannot be proved in detail as independent evidence with a view not to show the witness's credit and accuracy of recollection, but to establish who the prisoners committing the offence were: *R. v. Magon* (1840), 9 C. & P. 420; *R. v. Gutteridge* (1840), *id.* 472.

(*h*) *R. v. Lillyman*, [1896] 2 Q. B. 167.

(*i*) *R. v. Merry* (1900), 19 Cox, C. C. 442.

(*j*) See *R. v. Gordon (Lord George)* (1781), 21 St. Tr. 536; and *Iveson v. Lord Kinnaird* (1805), 6 East, 193.

(*k*) *R. v. Lloyd* (1830), 4 C. & P. 233.

contradict him, after he has, on cross-examination, denied making them (*l*). And if such previous statements have been reduced into writing, the practice in such a case is treated of, *post*, p. 297.

Statements of a third party are also admissible in the following instance—where a party to a proceeding expressly refers another party to a third person for information in reference to a matter in dispute, the statements of the third person may be admissions as against the person who refers to him (*m*).

SECTION 8.

OF DOCUMENTARY EVIDENCE.

Documentary evidence is not often requisite to any extent on the trial of prisoners at sessions. The following enumeration of the principal description of documents provable, with the modes of establishing them, may therefore suffice.

Public Acts.

Statutes of the Realm, or Acts of Parliament. Of these it is enough to observe, that “public Acts,” or Acts relating to the general interests of the kingdom, or of any large portion of it (as, *e.g.*, Bedford Level), or of a whole profession (as, *e.g.*, the body of the clergy), are judicially noticed, and need not be proved further than by the production of the printed statute book, or of the King’s printer’s copy, if it is a recent Act (*n*).

Private Acts.

And now “private Acts,” viz., Acts relating only to a “particular species of men or some individuals” (*o*), may be proved by a King’s printer’s copy by virtue of 8 & 9 Vict. c. 113, s. 3, which enacts, that all copies of private and local and personal Acts of Parliament not public Acts, if purporting to be printed by the King’s printers, and all copies of the journals of either House of Parliament, and of royal proclamations purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereby by all courts, judges, justices and others without any proof being given that such copies were so printed.

What to be deemed public or private Acts.

By 52 & 53 Vict. c. 63, s. 9, every Act passed after the year 1850 shall be a public Act, and shall be judicially noticed as such, unless the contrary is expressly provided by the Act (*p*).

Proclamations, orders or regulations of government departments.

By the Documentary Evidence Act, 1868 (31 & 32 Vict. c. 37), it is enacted, that *prima facie* evidence of any proclamation, order, or regulation issued before or after the passing of this Act by her Majesty, or by the privy council; also of any proclamation, order, or regulation issued before or after the

(*l*) 2 Phill. Ev. 9th ed. 432—434.

(*m*) *Daniel v. Pitt* (1806), 1 Camp. 366, n.; and see Stephen’s Digest of the Law of Evidence, 5th ed. p. 29.

(*n*) *R. v. Barnett* (1813), 3 Campb. 344.

(*o*) 1 Gilb. Ev. by Lofft, 12.

(*p*) Re-enacting 13 Vict. c. 21, s. 7, to the like effect.

passing of this Act, by or under the authority of any such department of the government or officer as follows; *i.e.*, the commissioners of the treasury; the commissioners for executing the office of lord high admiral; the secretaries of state; the committee of privy council for trade; the poor law board; the local government board (34 & 35 Vict. c. 70, s. 5); may be given in all courts of justice, and in all proceedings whatsoever in all or any of the modes hereinafter mentioned, that is to say:—

(1) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation.

(2) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the government printer; or where the question arises in a court in any British colony or possession, of a copy purporting to be printed under the authority of the legislature of such British colony or possession.

(3) By the production, in the case of any proclamation, order, or regulation, issued by her Majesty or by the privy council, of a copy or extract purporting to be certified to be true by the clerk of the privy council, or by any one of the lords or others of the privy council; and in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers by the production of a copy or extract purporting to be certified to be true by the person or persons specified as follows, in connection with such department or officer; *i.e.*, any commissioner, secretary, or assistant secretary of the treasury; any of the commissioners for executing the office of lord high admiral, or either of the secretaries to the said commissioners; any secretary or under-secretary of state; any member of the committee of the privy council for trade, or any secretary or assistant secretary of the said committee; any commissioner of the poor law board, or any secretary or assistant secretary of the said board; and by 34 & 35 Vict. c. 70, a rule, order, or regulation made by the local government board shall be valid if it is made under the seal of the board and signed by the president, or one of the *ex officio* members of the board, and countersigned by a secretary or assistant secretary; and the production of such *prima facie* evidence of any of the said rules, orders, or regulations, as is required by the Documentary Evidence Act, 1868, with respect to the rules, orders, or regulations of the poor law board shall, until the contrary is shown, be a sufficient proof that any such rule, order, or regulation of the local government board was duly made.

Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing.

No proof shall be required of the handwriting or official position of any person certifying in pursuance of this Act to the truth of any copy of or extract from any proclamation, order, or regulation.

The provisions of this Act shall be deemed to be in addition

to, and not in derogation of, any powers of proving documents given by any existing statute or existing at common law.

Government printer includes King's printer; and Gazette includes the London Gazette, the Edinburgh Gazette, and the Dublin Gazette.

Proclama-
tions, treaties,
acts of state,
judgments,
decrees, &c.
of foreign
states or
British
colonies.

By 14 & 15 Viet. c. 99, s. 7, all proclamations, treaties and other acts of state of any foreign state or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other documents filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive and examine evidence, either by examined copies, or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs: and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy to be admissible in evidence must purport, either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court; and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence without any proof of the seal, where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

Public books
of public
bodies.

The public books of recognized public bodies are, in many cases, evidence. Thus, the entries in books of the navy office are sufficient evidence that a person of a particular name is dead, but not of the identity of that person, which, if doubtful, must therefore be proved by other evidence(*q*).

General history may be referred to as proving a public matter relating to the government of the kingdom *in general*, but not any *particular* custom, or other matter affecting the private rights of individuals. And even books of general history, as topographical works, are not admissible on sub-

jects of public history, if any documents from which they were compiled be capable of proof (*r*).

Surveys and inquisitions taken on *public occasions* are evidence to ascertain the rights of individuals, or of parishes, or places named in them; but *only* when they have been taken under some *public* authority, and not by that of any private individual (*s*).

Almanacks (anciently called *kalendars*) are good evidence to prove on what day of the week a particular day of the year fell, and such like events, for there can be no other evidence of such things (*t*).

Records of the King's courts prove themselves, as do the *rolls* of courts *not* of record, so far as they affect the *public* interest (*u*). But records of the King's courts are only conclusive evidence, generally speaking, against those who are parties to them. Thus, an accessory may controvert the guilt of his principal, notwithstanding the record of such principal's conviction (*x*). The records of the quarter sessions will be formally drawn up if required. Where an indictment is to be proved, the production of it, indorsed "true bill," is not sufficient; the record must be regularly drawn up, and produced, or an examined copy of it, and the caption is a necessary part of the record (*y*). When the record cannot be produced,

(*r*) *Stainer v. Droitwich (Burgesses)* (1695), Salk. 281.

(*s*) Peake, Ev. 91.

(*t*) Cro. Eliz. 227; 3 Bla. Com. 333; Salk. 626; Ld. Raym. 994. The calendar on which the courts proceed is that annexed to the common prayer book: *Brough v. Perkins* (1703), 6 Mod. 81.

(*u*) 10 Co. 92.

(*x*) 1 Stark. Ev. 238, 249, 2nd ed. See Index, tit. "Accessories."

(*y*) *Porter v. Cooper* (1834), 6 C. & P. 354; *R. v. Ward* (1854), 6 C. & P. 366. A. Park, J. Indictment for perjury committed on the hearing of an appeal at quarter sessions: the sessions minute-book was produced to prove that the appeal came on to be heard. (The form of the minute in the book does not appear from the report in C. & P.; but Lord Denman, in *R. v. Yeoveley* (*infra*), inferred that the minute was one made only for the convenience of the clerk, and that the caption which was necessary to show that a court of competent jurisdiction had tried the appeal did not appear in it.) The deputy clerk of the peace stated, that, if applied to, he would have drawn up a record of the appeal on parchment; but that it was not the practice to do so, unless bespoke. A. Park, J., rejected the minute book, saying that a regular record, made up on parchment, as on a return to a *certiorari*, or a copy of such record, was the proper proof.

In *R. v. Yeoveley* (1838), 8 A. & E. 806, see *ante*, p. 31. Williams, J., distinguished *R. v. Ward* as a case in which the possibility of the offence of perjury having been committed, as charged, would depend on the court in which the oath was taken having jurisdiction or not; and that, consequently, in that case, such a record as would show jurisdiction must be proved. Patteson, J., noticed the fact that higher evidence was attainable in *R. v. Ward*, and Lord Denman disclaimed interference with its authority.

In *R. v. Yeoveley*, on the trial of an *appeal* against an order of removal, appellants, in order to prove it to have been quashed, put in the original sessions book, being a *paper* book containing the orders of the court, made up and recorded after each session by the clerk of the peace, from minutes taken by him in court. This book he stated to be the "record

being in another court, the proof is either by an exemplification under seal, or more commonly, by a copy examined with the original by the witness who produces it.

Records in the custody of the Master of the Rolls.

By 1 & 2 Vict. c. 94 (An Act for keeping safely the public records), s. 12, "the master of the rolls, or deputy keeper of the records, may allow copies to be made of any records in the custody of the master of the rolls, at the request and costs of any person desirous of procuring the same; and any copy so made shall be examined and certified

itself of the proceedings of the court." In it the entry of the proceedings at each session was headed *with the usual caption* of the justices; and at the termination of the proceedings of the session was the signature, "By the court, John Charge, clerk of the peace." No other record or entry of the proceedings at sessions appeared. The court held, that the only question being whether the order of sessions in question had been made at sessions, the book was good evidence of its being made, though that judgment of the court was not recorded on parchment; for the minute entered by the clerk of the peace was the only thing ever done at the sessions for the purpose of recording such an order; and no instance was adduced of its being held necessary to make up a formal record of the judgment of a quarter session on an appeal. See *R. v. Hains* (1695), cited 1 Stark. Ev. 2nd ed. 257.

R. v. Smith (1828), 8 B. & C. 341. Indictment for conspiracy stated, that "at the court of quarter sessions, holden, &c., an indictment against H. S. was preferred to, and found by, the grand jury;" and that defendants conspired to prevent W. B. from being examined before such grand jury. The deputy clerk of the peace produced an indictment against H. S., indorsed a true bill; on objection to receiving it in evidence without a general heading or caption, he stated that it was not the practice to make up the records in form unless desired to do so, but produced his book, in which minutes were made of the proceedings, and from which records were afterwards made up. He was suffered to read this minute—"Monmouthshire Sessions, 10 July, 1826, at the general quarter sessions of the peace, held at Usk, in and for the said county, this 10th July, 1826, before A. B., C. D., &c., &c." Then followed the business done at the sessions, *inter alia*, the indictment in question. Two defendants were convicted, but rule was made absolute for a new trial; for the quarter sessions, being a court of oyer and terminer (see, however, *ante*, p. 18), and of record, the record of the indictment should have been regularly drawn up on parchment (see also *R. v. Pembridge (Inhabs.)* (1841), C. & Mar. 157), and an examined copy produced to prove the indictment found; and the minutes in the book kept by the clerk of the peace were held not sufficient for that purpose: *R. v. Thring* (1832), 5 C. & P. 507.

In *R. v. Tooke*, 25 St. Tr. 446, the minutes of a court were received to prove the acquittal of a prisoner (Hardy) tried before it, *while sitting under the same commission*.

From *R. v. Bellamy* (1824), Ry. & M. N. P. C. 171, it seems that a minute book, in which entries of the proceedings at sessions are made, and from which book the roll containing the record of such proceedings is subsequently made up, is not itself a record so as to be admissible in evidence on an indictment, as a proof of the fact there stated.

Trespass and false imprisonment. Defendant, governor of Sierra Leone, arrested plaintiff at his factory on a river beyond the colony. Defendant objected to a witness called by plaintiff to prove his being convicted of trading in slaves in the court of Sierra Leone. The production of an instrument purporting to be an indictment on which a conviction had been had, and that it had been found by B. M. and his fellows on oath, was rejected by Bayley, J., for not showing by a caption that the indictment was found by persons competent to do so: *Cooke v. Maxwell* (1817), 2 Stark. N. P. C. 183. And see *ante*, p. 31.

as a true and authentic copy, by the deputy keeper of the records or one of the assistant record keepers aforesaid, and shall be sealed or stamped with the seal of the record office and delivered to the party for whose use it was made;" and by sect. 13, "every copy of a record in the custody of the master of the rolls, certified as aforesaid, and purporting to be sealed or stamped with the seal of the record office, shall be received as evidence in all courts of justice and before all legal tribunals, without any further or other proof thereof, in every case in which the original record could have been received there as evidence."

Ancient terriers are, or are not, admissible in evidence, according to the possession from which they come, and the parties by whom, and in whose interest, they are produced. Thus they can only, under very particular circumstances, be evidence *for* the clergyman, but may generally be evidence *against* him. But if they be signed by churchwardens appointed by the parish at large, and not by the parson, and whose interests were rather *against* him than *with* him, they become good evidence, even of rights. Ancient terriers.

Ancient maps, like terriers, surveys, and other such instruments, are subject to similar observations. Their being admitted as evidence must depend on the circumstances under which, and the parties by whom, they were made, the purpose and interest in which they are produced, and the object to be supported by them (*z*). A map made under a private Act is not even evidence of reputation, without proof of the Act (*a*). Ancient maps.

By 3 & 4 Will. 4, c. 87, s. 1, every *award* made before 28th August, 1833, under *any Inclosure Act*, is made valid from the time of its execution, as if enrolled in the manner limited by such Act; and by sect. 2, every award already made, *i.e.*, before same date, whether enrolled or not, and every copy of such award, when enrolled under sect. 1, or of any part thereof signed by the clerk of the peace of the county, &c. or *place*, or his deputy, purporting to be a true copy, shall at all times be admitted in all courts as legal evidence. Awards under Inclosure Acts.

Corporation books, so far as they concern the public government of a town, when publicly kept, and the entries made by a proper officer, are received as evidence of the facts contained in them (*b*). So the daily books of a prison are good evidence as to the time of a prisoner's discharge, &c., but not of the cause of his commitment (*c*). So the log book of a convoy man-of-war is evidence to prove when a certain ship came under her convoy (*d*), and the time of sailing and the general motions of the fleet (*e*). Corporation books.

(*z*) Taylor on Ev. 9th ed. § 622.

(*a*) *R. v. Milton* (1813), 1 C. & K. 58.

(*b*) Taylor on Ev. 9th ed. § 1781.

(*c*) *R. v. Aickles* (1781), 1 Lea. 390.

(*d*) *D'Israeli v. Jowett* (1795), 1 Esp. 427.

(*e*) Taylor on Ev. 9th ed. § 1776.

Corporation
books, public
and official
documents.

By 8 & 9 Vict. c. 113 (An Act to facilitate the admission in evidence of *certain official and other documents*), "Whereas it is provided by many statutes, that various certificates, official and public documents and proceedings of corporations, and of joint stock and other companies, and certified copies of documents, bye-laws, entries in registers and other books, shall be receivable in evidence of certain particulars in courts of justice, provided they be respectively authenticated in manner prescribed by such statutes; and whereas the beneficial effect of these provisions has been found by experience to be greatly diminished by the difficulty of proving that the said documents are genuine, be it enacted that whenever by any Act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation, or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed as directed by the respective Acts made, or to be hereafter made, without any proof of the seal or stamp, when a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof, in every case in which the original record could have been received in evidence."

2. "That all courts, judges, justices, commissioners, judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate or other judicial or official document."

A certificate of a conviction, made at the quarter sessions for a borough within the Municipal Corporations Act, 1835 (under which Act there was no power to appoint a deputy clerk of the peace), which purported to be signed by a person described thereon as deputy clerk of the peace of the borough, and having the custody of the records of the said quarter sessions, was held admissible under 8 & 9 Vict. c. 113, s. 1, as purporting to be made by "an officer having the custody of the records of the court where the conviction was made," within 5 Geo. 4, c. 84, s. 24, under which statute the certificate was given. *Semble*, when there is a *de facto* office, and by virtue of that office the person filling it has the custody of the records, he may give the certificate without holding the office *de jure* (*f*).

Parish regis-
ters.

Parish registers are evidence of the entries of births, baptisms, deaths, burials, marriages, &c. therein made, but

subject to the proof of the identity of the parties, in the same manner as has been observed respecting the books of the navy office (*g*); and such register may be proved either by the production of the originals from the proper custody, or of copies examined by a witness who produces them.

Certified extracts from a parish register, signed by the rector or vicar or curate of the parish, are admissible (*h*).

Non-parochial registers are by 3 & 4 Vict. c. 92, admitted as evidence of births or baptisms, deaths or burials and marriages, for it is enacted that the registrar-general of births, deaths and marriages in England shall receive and deposit in the general register office all registers and records of births, baptisms, deaths, burials, marriages then in custody of the commissioners then in existence, and such other registers as thereafter directed to be deposited with him. And he shall cause lists to be made of all the registers and records which may be placed in his custody by virtue of this Act, and every person shall be entitled, on payment of the fees hereinafter mentioned, to search the said lists and any register or record therein mentioned, between the hours of ten in the morning and four in the afternoon of every day, except Sundays and Christmas-day and Good Friday, but subject to such regulations as may be made from time to time by the registrar-general, with the approbation of one of his Majesty's principal secretaries of state, and to have a certified extract of any entry in the said registers or records (*i*). All registers and records deposited in the general register office by virtue of the Act, except as therein mentioned, shall be deemed to be in legal custody, and shall be receivable in evidence in all courts of justice, subject to the provisions thereafter contained; and the registrar-general shall produce, or cause to be produced, any such register or record on subpoena or order of any competent court or tribunal, and on payment of a reasonable sum, to be taxed as the court shall direct, and to be paid to the registrar-general on account of the loss of time of the officer by whom such register or record shall be produced, and to enable the registrar-general to defray the travelling and other expenses of such officer (*k*). But in all *criminal* cases in which it shall be necessary to use in evidence any entry or entries contained in any of the said registers or records, such evidence shall be given by producing to the court the original register or record (*l*).

Certified extracts from parish registers.

Non-parochial registers of births, marriages, deaths and burial.

In criminal cases.

Then, by 21 & 22 Vict. c. 25, the registrar-general is to receive and deposit in the general register office all the registers recommended to be deposited there by certain com-

(*g*) Peake, Ev. 92. See Roscoe on Ev. at Nisi Prius, 4th ed. 27, 79, 140.

(*h*) See *In re Hall's Estate* (1852), 22 L. J. Ch. 177; *Re Porter's Trusts* (1866), 25 L. J. Ch. 688.

(*i*) 3 & 4 Vict. c. 92, s. 5.

(*k*) *Ibid.* s. 6.

(*l*) *Ibid.* s. 17.

missions appointed to inquire into the custody of registers throughout the kingdom. And the provisions of the 3 & 4 Vict. c. 92, ss. 5 to 19 (*m*), both inclusive, are to be applicable to registers kept under the 21 & 22 Vict. c. 25.

By sects. 9, 10, 11 and 12 of the 3 & 4 Vict. c. 92, the registrar-general is to certify all extracts which may be granted by him from the registers or records deposited in the said office by causing them to be sealed or stamped with the seal of the office, and all extracts stamped with such seal shall be received in evidence in all *civil* cases, instead of the production of the original registers or records containing such entries. Every extract is to describe the register or record from which it is taken, and shall express that it is one of the registers or records deposited under this Act, and production of the register or book from the general office in the custody of the proper officer thereof, or the production of any such certified extract containing such description as aforesaid, and purporting to be stamped with the seal of the said office shall be sufficient to prove that such register or record is one of the registers or records deposited in the general register office under this Act. Where any party shall intend to use in evidence, on the trial of any cause, or on the hearing of any matter which is not a criminal case, at any session of the peace in England or Wales, any extract certified as hereinbefore mentioned from any such register or record he shall give notice in writing to the opposite party, his attorney or agent, of his intention to use such certified extract in evidence at such trial or hearing, and at the same time shall deliver to him, his attorney or agent, a copy of the extract and of the certificate thereof. And on proof by affidavit of the service, or on admission of the receipt of such notice and copy, such certified extract shall be received in evidence at such hearing, if the court shall be of opinion that such service has been made in sufficient time before such hearing to have enabled the opposite party to inspect the original register or record from which such certified extract had been taken or within such time as shall be directed by any rule of the judges to be made under that Act. And further, if any party intend to use the original register or record in evidence, he must give reasonable notice to the opposite party of his intention, and deliver a copy of a certified extract of the entry.

Every office or place where registers or records are deposited by the direction of the registrar-general is to be deemed to be a branch or part of the general register office (sect. 3).

By 14 & 15 Vict. c. 99, s. 10, every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particulars in any court of justice in Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same,

Irish documents.

(*m*) Sects. 18, 19, however, repealed by 37 & 38 Vict. c. 96 (S. L. R.).

shall be admitted in evidence to the same extent and for the same purposes in any court of justice in England or Wales, or before any person having, in England or Wales, by law or by consent of parties, authority to hear, receive and examine evidence without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

By 14 & 15 Vict. c. 99, s. 8, every certificate of the qualification of an apothecary, which shall purport to be under the common seal of the society of the art and mystery of apothecaries of the city of London, shall be received in evidence in any court of justice, and before any person having by law authority to hear, receive and examine evidence without any proof of the said seal, or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been from the date of the said certificate duly qualified to practise as an apothecary in any part of England or Wales.

Diploma of
Apothecaries
Hall.

By 14 & 15 Vict. c. 99, s. 14, ‘whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence; provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

Public docu-
ments—copies
of.

A certified copy of an entry in the register books in a registrar’s district, part of a superintendent registrar’s district, certified by the deputy superintendent registrar, who also certified that the book was in his lawful custody, has been held to be admissible in evidence in a criminal case upon mere production, coupled with proof of identity to prove the date of the birth of a child under the 14 & 15 Vict. c. 99, s. 14 (n).

Extracts from
registers.

It would thus appear that 14 & 15 Vict. c. 99, s. 14, applies to non-parochial registers.

Certain documents are by statute receivable as evidence. Thus the qualifications of a medical man are proved by production of a copy of the “Medical Register” for the time being, and in case of a person whose name does not appear in such register, by a certified copy under the hand of the registrar of the general council, or of any branch council, of the entry of the name of such person on the general or local

Proof of quali-
fication of
doctors.

register (*h*). The same section enacts that the absence of the name of any person from the printed copy of the "Medical Register" shall be evidence, until the contrary be made to appear, that such person is not registered according to the provisions of the Act. Proof of qualification, by production of an official register, is also available in the case of dentists (*i*), pharmaceutical chemists and druggists (*k*), and veterinary surgeons (*l*).

Dentists,
chemists,
veterinary
surgeons.

Officers. The rank of an officer in the army or navy is proved by production of an army list or gazette in which his name appears (*m*). Copies of certain regimental books are also made evidence in civil courts (*n*).

Solicitors. That a solicitor is duly certificated can be proved either by production of his certificate duly signed, stamped, and with the date of payment of duty denoted, or by production of the current Law List (*n*), or by an extract from the roll of solicitors certified under the hand of the secretary of the Law Society (*n*). Under the Factory and Workshop Act, 1878 (41 Vict. c. 16), by sect. 92, the written declaration of the certifying surgeon shall be admissible in evidence of the age of the person mentioned in the certificate.

Act book of an ecclesiastical court. The act book of an ecclesiastical court is a book of a public nature, and an unstamped copy of the act book is sufficient evidence of the probate of a will to prove the executorship (*o*). The office copy of the bill of sale, and affidavit required to be filed by the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), are public documents, and provable by a copy under sect. 16 of that Act, and also under 14 & 15 Vict. c. 99, s. 14 (*p*).

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), contains the following provisions as to evidence:—

Sect. 132.—(1.) A copy of the London Gazette containing any notice inserted therein in pursuance of this Act (*q*), shall be evidence of the facts stated in the notice.

(*h*) 21 & 22 Vict. c. 90, s. 27.

(*i*) 41 & 42 Vict. c. 33, s. 29.

(*k*) 15 & 16 Vict. c. 56, s. 7; and 31 & 32 Vict. c. 121, s. 13.

(*l*) 44 & 45 Vict. c. 62, s. 3, sub-s. 2, and s. 9.

(*m*) Army Act, 1881 (44 & 45 Vict. c. 58), s. 163.

(*n*) Solicitors Act, 1860 (23 & 24 Vict. c. 127), s. 22.

(*o*) *Dorrett v. Meux* (1854), 23 L. J. C. P. 221.

(*p*) *Grindell v. Brendon* (1859), 28 L. J. C. P. 333; *Bath v. Sutton* (1858), 27 L. J. Ex. 388.

(*q*) The Act (and rules made thereunder) require notification in the *London Gazette* of the following matters:—Adjudication, sect. 20 (2); r. 193 (2); administration order under sect. 125 (estates of deceased persons), r. 275; annulment of adjudication, sect. 35 (3); r. 194 (2); appointment of trustee, r. 298; approval of composition, r. 201 (2); order of discharge, r. 242; time and place of hearing application for discharge, r. 235 (1); notice of dividend, r. 232 (3); notice of intended dividend, r. 232 (5); sect. 58 (4); first meeting, 1st sched. (2); r. 250; notice of public examination, r. 186; receiving order, sect. 13; release of trustee, r. 310; removal of trustee, r. 303; transfer of surplus in joint and separate estates, r. 293.

(2.) The production of a copy of the London Gazette containing any notice of a receiving order, or of an order adjudging a debtor bankrupt, shall be conclusive evidence in all legal proceedings of the order having been duly made, and of its date (*r*).

Sect. 133.—(1.) A minute of proceedings at a meeting of creditors under this Act, signed at the same or the next ensuing meeting, by a person describing himself as, or appearing to be chairman of the meeting at which the minute is signed, shall be received in evidence without further proof.

(2.) Until the contrary is proved, every meeting of creditors in respect of the proceedings whereof a minute has been so signed shall be deemed to have been duly convened and held, and all resolutions passed or proceedings had thereat to have been duly passed and had.

Sect. 134. Any petition or copy of a petition in bankruptcy, any order or certificate or copy of an order or certificate made by any court having jurisdiction in bankruptcy, any instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceedings, or other proceedings had under this Act, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever.

Sect. 136. In case of the death of the debtor or his wife, or of a witness whose evidence has been received by any court in any proceeding under this Act, the deposition of the person so deceased, purporting to be sealed with the seal of the court, or a copy thereof purporting to be so sealed, shall be admitted as evidence of the matters therein deposed to (*s*).

Sect. 137. Every court having jurisdiction in bankruptcy under this Act shall have a seal describing the court in such manner as may be directed by order of the Lord Chancellor, and judicial notice shall be taken of the seal, and of the signature of the judge and registrar of any such court in all legal proceedings.

Sect. 138. A certificate of the Board of Trade that a person has been appointed trustee under this Act, shall be conclusive evidence of his appointment (*t*).

(*r*) Probably this would be held not to cover an order upon appeal discharging an order of adjudication, nor an order annulling it: *Ex parte Geisel, re Stanger* (1882), 22 Ch. D. 436. As to conclusiveness of evidence as against all the world, see *Ex parte French, re Trim* (1882), 47 L. T. R. 339; *Ex parte Leavoyd, re Foulds* (1878), 10 Ch. D. 3.

(*s*) This does not by implication say that in no case is such a deposition to be admissible as evidence during the life of the person making it: *R. v. Widdop* (1872), 42 L. J. M. C. 9.

(*t*) This applies in criminal cases, and the certificate is conclusive both as to the fact and as to the date of the appointment: *R. v. Beaumont* (1872), 26 L. T. R. 587.

Sect. 140.—(1.) All documents purporting to be orders or certificates made or issued by the Board of Trade, and to be sealed with the seal of the Board, or to be signed by a secretary or assistant secretary of the Board, or any person authorized in that behalf by the President of the Board, shall be received in evidence, and deemed to be such orders or certificates without further proof unless the contrary is shown.

(2.) A certificate signed by the President of the Board of Trade that any order made, certificate issued, or act done, is the order, certificate, or act of the Board of Trade, shall be conclusive evidence of the fact so certified.

Previous convictions—certificates of.

In order to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court, where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction and judgment or acquittal, as the case may be, omitting the formal parts thereof (*u*).

But when the second indictment is preferred before the same court, sitting under the same commission, a minute of the former proceeding will be admitted, because the formal record cannot be supposed to be made up (*x*).

And by 34 & 35 Vict. c. 112, s. 18, a previous conviction may be proved in any legal proceeding whatever against any person by producing a record or extract of such conviction, and by giving proof of the identity of the person against whom the conviction is sought to be proved with the person appearing in the record or extract of conviction to have been convicted. A record or abstract of a conviction shall in the case of an indictable offence consist of a certificate containing the substance and effect only (omitting the formal part of the indictment and conviction), and purporting to be signed by the clerk of the court or other officer having the custody of the records of the court by which such conviction was made, or purporting to be signed by the deputy of such clerk or officer; and in the case of a summary conviction shall consist of a copy of such conviction, purporting to be signed by any justice of the peace having jurisdiction over the offence in respect of which such conviction was made, or to be signed by the proper officer of the court by which such conviction was made, or by the clerk or other officer of any court to which such conviction has been returned.

(*u*) 14 & 15 Vict. c. 99, s. 13.

(*x*) *R. v. Tooke* (1794), 26 St. Tr. 446—449; *R. v. Parry* (1837), 7 C. & P. 836.

A record or extract of any conviction, made in pursuance of this section, shall be admissible in evidence without proof of the signature or official character of the person appearing to have signed the same.

A previous conviction in any one part of the United Kingdom may be proved against a prisoner in any other part of the United Kingdom; and a conviction before the passing of this Act shall be admissible in the same manner as if it had taken place after the passing thereof. A fee not exceeding five shillings may be charged for a record of conviction given in pursuance of this section.

The mode of proving a previous conviction, authorized by this section, shall be in addition to and not in exclusion of any other authorized mode of proving such conviction.

Parol evidence of a person who heard the sentence passed is not legal evidence of a previous conviction (*y*). Nor, it would seem, the evidence of policemen and prison officers that they had had the prisoner in their custody under a conviction (*z*).

The herald's books are good evidence of pedigree, and such matters; but entries in them, taken from records, cannot be evidence, because the records themselves (or in cases here-

books.

after to be noticed, copies of them) might be obtained (*a*). And, for numerous reasons, inscriptions on monuments and gravestones are evidence of the same, subject to the common rules respecting proof of identity (*b*).

Evidence of pedigree.

The sentence of the Ecclesiastical Court on a subject within its jurisdiction, *e.g.*, the lawfulness of a marriage, was a judgment *in rem*, and good evidence of the status of the parties (*c*), and now the decree of the court for divorce and matrimonial causes has the same effect (*d*).

By the 11 & 12 Vict. c. 42, s. 17, *depositions* (*viz.*, information on oath" of persons acquainted with the facts) are taken by the justice or justices, before he or they commit the accused person to prison for trial, or before he or they admit him to bail, but the justice must in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement of such persons on oath or affirmation and put the same into writing, and such depositions must be read over to and signed respectively by the witnesses who shall have been so examined, and must be signed also by the justice or justices taking the same. . . . And if upon the trial of the person so accused, as first aforesaid, it shall be proved by the oath

Depositions.

Admissibility of depositions in evidence on trial.

(*y*) *R. v. Bourdon* (1847), 2 C. & K. 366.

(*z*) *R. v. Summers* (1869), L. R. 1 C. C. R. 182.

(*a*) See *Davies v. Lowndes* (1838), 5 Bing. N. C. 161.

(*b*) *Taylor on Ev.* 6th ed. pp. 587, 588.

(*c*) *Ibid.* pp. 1434, 1435.

(*d*) 20 & 21 Vict. c. 85, ss. 7, 16, 27, 31.

After examination of the accused, justice to read depositions taken against him, and caution him as to any statement he may make;

and inform him that he has nothing to hope or fear from either promise or threat.

or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if, also, it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same. Then, by 11 & 12 Vict. c. 42, s. 18, it is enacted, that after the examinations of all the witnesses on the part of the prosecution shall have been completed, the justice of the peace, or one of the justices, by or before whom such examination shall have been so completed shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;" and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person, the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always, that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.

And by 30 & 31 Vict. c. 35, s. 3, in order to remove all ground for a complaint frequently made by prisoners on their trial, that they were unable by reason of poverty to call witnesses on their behalf, and that injustice was thereby done them, it was enacted that "such justice or justices, immediately after obeying the directions of the 18th section of the

11 & 12 Vict. c. 42, demand and require of the accused person whether he desires to call any witness, and if the accused person shall in answer to such demand call or desire to call any witness or witnesses, such justice or justices shall, in the presence of such accused person, take the statement on oath or affirmation, both examination and cross-examination, of those who shall be so called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same into writing, and such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same and transmitted in due course of law with the depositions, and such witnesses not being witnesses merely to the character of the accused as shall, in the opinion of the justice or justices, give evidence in any way material to the case, or tending to prove the innocence of the accused person, shall be bound by recognizance to appear and give evidence at the said trial, and afterwards upon the trial of such accused person all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken.

Depositions
of prisoners'
witnesses.

And by sect. 4, all the provisions of the 11 & 12 Vict. c. 42, relating to the summoning and enforcing the attendance and committal of witnesses, and binding them by recognizance and committal in default, and for giving the accused person copies of the examinations, and giving jurisdiction to certain persons to act alone, shall be read and have operation as part of this Act.

And by 30 & 31 Vict. c. 35, s. 6, it is recited, that by the above 17th section of 11 & 12 Vict. c. 42, it is permitted, under certain circumstances, to read in evidence on the trial of an accused person the deposition taken in accordance with the provisions of the said Act of a witness who is dead, or so ill as to be unable to travel, and that it may happen that a person dangerously ill and unable to travel may be able to give material and important information relating to an indictable offence, or to a person accused thereof, and it may not be practicable or permissible to take in accordance with the provisions of the said Act the examination or deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person, and it is desirable in the interests of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same: therefore, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not

Depositions
to perpetuate
testimony.

likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto, by way of caption, a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof; and if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial shall transmit the same with the said addition to the proper officer of the court for trial, at which such accused person shall have been so committed or bailed, and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city or borough in which he shall have taken the same, who is hereby required to preserve the same and file it of record: and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read such statement in evidence either for or against the accused without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person or his counsel or attorney had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.

By sect. 7, provision is made for conveying a prisoner in actual custody to the place mentioned in the notice, for the purpose of being present at the taking of the statement.

There is nothing in 11 & 12 Vict. c. 42, s. 17, to restrict the rule of practice adopted since the statutes of Philip and Mary, with reference to the admissibility of depositions upon the trial of prisoners, and it has been said that it has added a different class of cases in which depositions are to be admissible, and has introduced in terms the principle that the prisoner should have full opportunity of cross-examination, which he formerly had only by the equitable construction of the law (*e*). Therefore the charge on which the depositions

were taken need not be the particular technical charge on which the accused is afterwards tried, and depositions of the prosecutor taken on a charge of wounding with intent to do grievous bodily harm were received in evidence after his death on the trial of the accused for his murder, arising out of the same transaction (*f*). Where the charge at the trial is not identically the same with that before the magistrate, it ought to be a matter of inquiry for the judge trying the case whether the prisoner had a full opportunity for cross-examination (*g*), and was duly apprised of the nature of the charge (*h*).

The deposition of a person suffering from a second attack of paralysis, in consequence whereof he could neither speak nor hear, who might have been brought to attend the trial without danger to his life, but whose physician deposed that "he could not permit him to roam abroad if he knew it," was held to be rightly received (*i*). It is for the discretion of the judge at the trial to decide whether illness preventing the witness from travelling is proved (*k*); but old age and nervousness and inability to stand a cross-examination is not sufficient to dispense with the attendance of the witness, and to enable the depositions to be read (*l*). The deposition has been admitted of a woman who had been confined a week before, and who was unable merely on that account to travel (*m*); and Bramwell, B., admitted a deposition where the witness was pregnant, and where the husband swore that a fortnight before he had driven her into the assize town and "she had suffered somewhat in consequence," but said that if the prisoner were convicted he should probably state a case on the point for the consideration of the Court for Crown Cases Reserved. The prisoner was acquitted. And in the Court for Crown Cases Reserved (*n*), in a case stated from the Worcester-shire quarter sessions, where a witness had not been present "as her confinement might not take place till the middle of next week, but might take place at any hour," but her deposition was received in evidence, Coleridge, C. J., said: "Pregnancy may be a source of such illness as to render the witness unable to travel, and be an illness within the statute. It is in each case a matter for the presiding judge to determine." And this was followed by Bowen, L. J., in a similar case (*o*).

(*f*) *R. v. Beeston* (1854), 24 L. J. M. C. 5; and *R. v. Smith* (1817), Russ. & Ry. 339.

(*g*) *Ibid.*

(*h*) *R. v. Langbridge al. Langridge* (1849), 18 L. J. M. C. 198.

(*i*) *R. v. Cockburn* (1857), 26 L. J. M. C. 136.

(*k*) *R. v. Stephenson* (1862), 31 L. J. M. C. 147.

(*l*) *R. v. Farrell* (1874), L. R. 2 C. C. R. 116; *R. v. Parker* (1862), Arch. Cr. Pl. 22nd ed. p. 342; *R. v. Stephenson*, *ubi sup.*

(*m*) *R. v. Hurney* (1850), 4 Cox, C. C. 441.

(*n*) *R. v. Wellings* (1878), 3 Q. B. D. 426.

(*o*) *R. v. Goodfellow* (1879), 14 Cox, C. C. 326.

It was holden on the statutes of Philip and Mary, now replaced as above, that in the cases of felony, to which alone they extended, if a magistrate in the presence of the prisoner took the deposition on oath of the party injured, or of an accomplice, who died before, or was actually insane at the time of the trial, the deposition might be read in evidence at it (*p*); but that if the prisoner was not present at the examination, it could not; the rule being universal, that where there is no opportunity of cross-examination, a mere *ex parte* statement, though made on oath, and under the most solemn circumstances as respects the deponent's condition as a dying man, is not admissible as evidence, except in the single instance of an indictment for killing the deponent. The title or caption to the depositions is sufficient if it state the occasion on which it is taken and the matter to which it refers, and it need not state the charge upon which it is taken with technical accuracy; in fact, there is no necessity for any formal caption at all (*q*). Where statements elicited from the prosecutor's witness by cross-examination, on an occasion subsequent to that on which he was examined in chief, were taken down and returned to the court on a sheet not signed by the magistrate, or pinned up with a sheet containing evidence given in chief for the prisoner, which was so signed, the whole deposition, as well in chief as on cross-examination, was rejected as inadmissible *against* the prisoner, the witness having died before the trial (*r*). But it is not absolutely necessary that the separate deposition of each witness should be signed by the justices; and where a deposition of a deceased witness, taken under the above 17th section, appeared to be the second of four depositions, all of which were pinned together, each occupying more than one piece of paper, the justices had not signed either of the sheets on which the depositions were written, except the last, and that sheet did not contain any part of the deposition in question, but their signatures were appended at the end of the last deposition, to a statement at the end of the form copied from Schedule (M), "the above depositions, naming the witnesses, were taken and sworn before us;" it was held that the depositions, signed as a body according to the Schedule (M), were sufficiently signed and admissible (*s*). In one case the deposition of a prosecutor was taken before a justice, in the presence of a prisoner, on the *same sheet* of paper with those of other witnesses. At the end of the last deposition were the words, "Sworn before me" (the magis-

(*p*) *R. v. Marshall and others* (1841), C. & M. 147; *sees* if, though witness's intellects are affected by injuries on the head, he is expected to recover from them.

(*q*) *R. v. Langbridge al. Langridge* (1849), 18 L. J. M. C. 198.

(*r*) *R. v. France* (1839), 2 M. & Rob. 207.

(*s*) *R. v. Parker* (1870), 39 L. J. M. C. 60.

trate's signature). The prosecutor having died before the trial, his deposition was read in evidence, though it had not been signed in particular by the magistrate (*t*).

Where, by mistake, depositions are begun to be taken and put in writing before the prisoner arrives, the party should be re-sworn in his presence, and the depositions then read over to the deponent, who must state them to be correct; or a still better course is to make the witness repeat his evidence before the prisoner (*u*). The prisoner should then be asked, if he will ask the witness any questions, and nothing should be returned as a deposition unless he has had an opportunity of knowing what was said, and of cross-examining the witnesses (*x*). The statements elicited on cross-examination should be carefully taken down, and each sheet signed by the magistrates (*y*). The depositions may afterwards be signed by the magistrate, and when returned by him will be evidence at the trial (*z*), if proved by him or his clerk, who were present when they were taken, as before stated with respect to confessions (*a*); and the depositions, under 11 & 12 Vict. c. 42, s. 17, must be taken in the presence of the justice as well as be signed by him to be admissible (*b*).

The deposition, regularly taken as above, may also be read in evidence at the trial, if the witness is proved to be kept out of the way by the means or procurement of the prisoner (*c*); but where two or more prisoners are being tried jointly, the depositions of a witness whose absence is procured by one, without concert with the others, is only admissible against the one who has procured the absence (*d*). The mere absence of a witness is no ground for reading his deposition, though he cannot be found (*e*), or is residing abroad (*f*).

What a prisoner says in other places is, of course, receivable on oral testimony (*g*). Statements made under oath, and reduced into writing on a preliminary inquiry by a properly constituted tribunal without objection, are admissible afterwards on the trial of the person who made them on a charge arising out of the inquiry (*h*). Written depositions, properly taken as above before a magistrate, are the best evidence of the witness's statement on that occasion, not only in the pro-

(*t*) *R. v. Osborne* (1837), 8 C. & P. 113.

(*u*) See *R. v. Beeston* (1854), 24 L. J. M. C. 5.

(*x*) *R. v. Arnold* (1838), 8 C. & P. 621.

(*y*) See *R. v. France* (1839), 2 M. & Rob. 207.

(*z*) *R. v. Smith* (1817), Russ. & Ry. 339.

(*a*) *Ante*, p. 260.

(*b*) *R. v. Watts* (1863), 33 L. J. M. C. 63.

(*c*) *R. v. Scaife* (1851), 20 L. J. M. C. 229.

(*d*) *Ibid.*

(*e*) *R. v. Scaife*, *ubi sup.*; *R. v. Lord Morley* (1666), 6 How. St. Tr. 770.

(*f*) *R. v. Austin* (1856), 25 L. J. M. C. 48.

(*g*) *R. v. Jacobs* (1784), 1 Lea. 310.

(*h*) *R. v. Coote* (1873), 42 L. J. P. C. 45; M. C. 114.

ceeding for which they are taken, but also in all other proceedings, civil as well as criminal, in which it is sought to give the witness's statement in evidence (*i*). As to the prisoner's right to copies of the depositions, see *post*, pp. 323, 324.

Ancient
deeds.

Deeds purporting upon the face of them to be *thirty years old* or upwards, may be given in evidence without proof of execution; but some account of what custody they are produced from, and other circumstances to show the fairness of the exhibition, may be necessary to entitle them to unqualified credit. If there be any erasures or interlineations, or other circumstances to create doubts, such circumstances must be accounted for, to rebut the presumption of fraud or fabrication (*j*). Where attestation is requisite to the validity of any instrument the only proof of deeds or other writings to which there are subscribing witnesses, is by calling one of them; unless all be dead, or beyond seas, or incompetent; when the proof is by showing the handwriting of one of them, and the identity of the witness to the deed with the person whose handwriting is proved. But it is not necessary to prove by the attesting witness any instrument to which attestation is not necessary, and such instrument may be proved as if there had been no attesting witness thereto (*k*).

Copies.

It may be laid down as a general rule, that wherever original instruments can be obtained, no inferior evidence of their contents is admissible; but where the record, the contents of which it is necessary to give in evidence, is public property, and cannot be obtained by subpoena, or other process, from the place where it ought always to remain; or, in such instances as parish registers and other depositaries where the contents concern the public, attested copies of such records and entries are good evidence (*l*). A copy of a letter taken by a machine, worked by the witness who produces the copy, may be proved by him as secondary evidence, though he did not examine the impression with the original (*m*).

When a document is in the hands of a stranger, *who is not compellable by law to produce it*, and who *refuses to do so*, either when summoned as a witness with a *subpoena du. te.* (*n*), or when sworn as a witness without a *spa.*, if he admits that he has the document in court (*o*), secondary evidence of the contents of the document is admissible. But the mere disobedience of a person served with a *spa. du. te.* will not render

(*i*) *Leach v. Simpson* (1839), 5 M. & W. 309.

(*j*) Bull. N. P. 255.

(*k*) 28 & 29 Vict. c. 18, s. 7.

(*l*) See *ante*, pp. 284, 285.

(*m*) *Simpson v. Thoreton* (1842), 2 M. & Rob. 433.

(*n*) *Mills v. Oddy* (1834), 6 C. & P. at p. 732; *Marston v. Downes* (1834), 1 A. & E. 31; *Doe v. Ross* (1840), 7 M. & W. 102.

(*o*) *Doe v. Clifford* (1847), 2 C. & K. 448. Secondary evidence is not admissible unless either the deed is in court or the witness has been subpoenaed to produce it.

admissible secondary evidence of the contents of the document which he is called upon to produce (*p*). In such a case the party has his remedy against the disobedient person.

Private writings, not under seal, are proved by evidence of the handwriting of the party by whom they purport to be written or signed. This proof may be given either by a person who has seen the party write, or by one who has received letters from him in the course of correspondence, and acted on them (*q*). It is never necessary that a witness should swear positively to handwriting; it is sufficient if, having means of knowledge, he swears that he believes it to be the handwriting of the individual alleged to be the writer; this belief may be formed even from corresponding with a person of the same name as the alleged writer, as of the same address, there being evidence that no other person of the same name lived at the same place, without ever having seen the person write (*r*), or has only once seen him write, and then only his surname (*s*); and it will be a question whether, under all the circumstances, the belief is such as the jury can safely act on. All evidence of handwriting, except where the witness sees the document written, is, in its nature, *comparison*. It is the belief which the witness entertains on comparing the writing in question with an exemplar in his mind derived from some previous knowledge. And now by 28 & 29 Vict. c. 18, s. 8, comparison of a disputed handwriting, with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.

Private writings not under seal.

Comparison of handwriting.

By the Stamp Act, 1891 (54 & 55 Vict. c. 14), s. 4, documents which in civil proceedings would be inadmissible for want of a stamp are admissible in criminal proceedings although unstamped.

Stamps on instruments.

In civil matters at quarter sessions, to which matters the above-mentioned statutory exemption does not apply, when an instrument is offered in evidence without the stamp required by law, the opposite counsel should ask to see it, and object immediately if he object at all; for as the defect, *e.g.*, the absence, or too small amount, of the stamp, appears on the face of it, it will be too late to do so after it has been put in and read (*t*), even if that has happened from accidental neglect of the counsel, after having asked to see it (*u*).

(*p*) *Jesus College v. Gibbs* (1835), 1 Y. & C. Ex. 156; *R. v. Llanfachly* (1853), 2 E. & B. 940. And see Taylor on Ev. 9th ed. § 457.

(*q*) Taylor on Ev. 9th ed. § 1862.

(*r*) *Harrington v. Fry* (1824), Ry. & M. N. P. C. 90.

(*s*) *Lewis v. Sapio* (1827), M. & M. 39.

(*t*) *Field and another v. Woods* (1837), 7 A. & E. 114; *Robinson v. Vernon* (1860), 29 L. J. C. P. 310.

(*u*) *Foss v. Wagner* (1831), 7 A. & E. 116, n.

Impounding
public docu-
ments.

By 8 & 9 Vict. c. 113, s. 4 (*x*), it is provided, that whenever any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding shall have been received in evidence by virtue of that Act, the court, judge, commissioner or other person officiating judicially who shall have admitted the same shall, on the request of any party against whom the same is so received, be authorized at its or his own discretion to direct that the same shall be so impounded and be kept in the custody of some officer of the court or other proper person until further order touching the same shall be given, either by such court or by the persons or person who constituted such court, or by some one of the equity or common law judges of the superior courts of Westminster on application being made for that purpose.

SECTION 9.

OF THE COMPETENCY OF WITNESSES.

Competency
of witnesses.

Witnesses
not to be
incapacitated
from giving
evidence by
reason of
crime or
having an
interest.

In criminal
proceedings
accused not
competent,

or husband or
wife of
accused.

Formerly witnesses who had been convicted of a crime were deemed incompetent witnesses unless and until they received a pardon; but now by 6 & 7 Vict. c. 85, no person offered as a witness shall be excluded by reason of incapacity from crime or interest from giving evidence, but every person so offered may and shall be admitted to give evidence, notwithstanding that such person may or shall have an interest in the matter in question, and notwithstanding such person offered as a witness may have been previously convicted of any crime or offence. By 14 & 15 Vict. c. 99, the parties to proceedings, and the persons in whose behalf any action or other proceeding may be brought or defended, shall be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the court, on behalf of either or any of the parties to the said suit, action, or other proceeding. But by sect. 3, nothing therein contained was to render any person who in any criminal proceeding was charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable to give evidence for or against himself or herself, or was to render any person compellable to answer any question tending to criminate himself or herself, or in any criminal proceeding render any husband competent or compellable to give evidence

for or against his wife, or any wife competent or compellable to give evidence for or against her husband (*y*).

By the Evidence Act, 1877 (40 & 41 Vict. c. 14), on the trial of an indictment or other proceeding for the non-repair of any highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses and compellable to give evidence.

Of recent years, before the passing of the Criminal Evidence Act, 1898, mentioned below, it had become usual for Parliament, in creating new offences, to enact that accused persons and their wives and husbands should be admitted to give evidence. As these various enactments are all now practically superseded by the last-mentioned Act, it is not considered worth while to enumerate them. By the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), it is now enacted as follows:—

By sect. 1 every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person.

Provided as follows—

- (a) A person so charged shall not be called as a witness in pursuance of this Act except on his own application.
- (b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution.
- (c) The wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act, except upon the application of the person so charged.
- (d) Nothing in this Act shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage.
- (e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged.
- (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question

(*y*) See also a similar enactment in 16 & 17 Vict. c. 83, s. 2.

tending to show he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged ; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution ; or

(iii) he has given evidence against any other person charged with the same offence.

(g) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the court, give his evidence from the witness-box or other place from which the other witnesses give their evidence.

(h) Nothing in this Act shall affect the provisions of sect. 18 of the Indictable Offences Act, 1848, or any right of the person charged to make a statement without being sworn.

2. Where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

3. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

4.—(1) The wife or husband of a person charged with an offence under any enactment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without consent of the person charged.

(2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

5. In Scotland, in a case where a list of witnesses is required, the husband or wife of a person charged shall not be called as a witness for the defence unless notice be given in the terms prescribed by sect. 36 of the Criminal Procedure Act (Scotland), 1887.

6.—(1) This Act shall apply to all criminal proceedings, notwithstanding any enactment in force at the commencement

of this Act, except that nothing in this Act shall affect the Evidence Act, 1887.

(2) But this Act shall not apply to proceedings in courts martial unless so applied—

(a) as to courts martial under the Naval Discipline Act, by general orders made in pursuance of sect. 65 of that Act;

(b) as to courts martial under the Army Act, by rules made in pursuance of sect. 70 of that Act.

7.—(1) This Act shall not extend to Ireland.

(2) This Act shall come into operation on the expiration of two months from the passing thereof.

(3) This Act may be cited as the Criminal Evidence Act, 1898 (z).

The following points of practice under the Act have been decided:—

The Act does not enable an accused person to give evidence before the grand jury (a). Although under sect. 1 (b) the prosecution may not comment on the failure of the accused person, or of his or her wife or husband to give evidence, the judge may, in the exercise of his discretion, do so if he thinks fit (b). “The wise exercise of this discretion depends upon the circumstances of each case. It is impossible to lay down any general rule” (c). Where the accused gives evidence in his own behalf, but does not call witnesses, the counsel for the prose-

(z) The Act came into operation on the 12th October, 1898.

The schedule to the Act is as follows:—

ENACTMENTS REFERRED TO.

Session and Chapter.	Short Title.	Enactments referred to.
5 Geo. 4, c. 83.....	The Vagrancy Act, 1824..	The enactment punishing a man for neglecting to maintain or deserting his wife or any of his family.
8 & 9 Vict. c. 83....	The Poor Law (Scotland) Act, 1845.	Section eighty.
24 & 25 Vict. c. 100..	The Offences against the Person Act, 1861.	Sections forty-eight to fifty-five.
45 & 46 Vict. c. 75..	The Married Women's Property Act, 1882.	Section twelve and section sixteen.
48 & 49 Vict. c. 69..	The Criminal Law Amendment Act, 1885.	The whole Act.
57 & 58 Vict. c. 41..	The Prevention of Cruelty to Children Act, 1894.	The whole Act.

(a) *R. v. Rhodes*, [1899] 1 Q. B. 77.

(b) *Ibid.*

(c) *Per Lord Russell*, L. C. J. *Ibid.*

cution is entitled, immediately after the accused has given his evidence, to sum up the case for the Crown, and in so doing to comment upon the evidence given by the person charged (*d*).

The Act applies to all criminal proceedings, and therefore an accused person cannot be asked in cross-examination whether he has been previously convicted, except in accordance with the provisions of the Act, although he may be giving evidence in a case in which he would have been entitled to give evidence before the Act (*e.g.*, under the Prevention of Cruelty to Children Act), and although, had the case happened before the Act came into operation, he might have been asked in cross-examination as to previous convictions (*e*).

Persons incompetent.

Since these Acts it may be said that nearly all the parties who are disqualified from giving evidence are those who, from tender age or defect of intellect, are incapable of understanding the obligation of an oath or (in certain cases) the duty of speaking the truth.

The first class are—

Persons incompetent.

Persons incompetent from defect of understanding, or ignorance, as children, lunatics, idiots, and ignorant adults. By sect. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), where, upon the hearing of a charge under that section (*i.e.*, carnally knowing a girl under thirteen years of age or attempting so to do), the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if, in the opinion of the court, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth (*f*).

A similar provision is contained in sect. 15 of the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), with reference to cases prosecuted under that Act.

Subject to the foregoing enactments, mere youth, however tender, although a proper ground for cautious investigation as to the understanding of a child, is never in itself a reason for rejecting its testimony. Upon this subject, experience shows that no certain rule as to age could be adopted with propriety; if the child, of how tender age soever, comprehends the difference between truth and falsehood, and believes that falsehood is a crime, and will be punished by God in a future

(*d*) *R. v. Gardner*, [1899] 1 Q. B. 150.

(*e*) *Charnock v. Meekant*, [1900] 1 Q. B. 474.

(*f*) The evidence must be corroborated by some material evidence implicating the accused: sect. 4.

state, he may be sworn and examined; whereas if he has no such sense, though of an age when such knowledge might reasonably be expected, he cannot be sworn, but he must, it is submitted, be affirmed as a person having no religious belief (*g*). The same rule applies to persons who are surmised to be insane or idiots; the court is to be satisfied by its own examination, or upon evidence called on either side, of the state of their intellects, and will judge whether the insane person is of competent understanding, and admit or exclude their testimony as may seem best to its discretion, and then the jury are to decide on the credibility and weight to be attached to the evidence (*h*). A person with a mere organic defect, as one who is deaf and dumb, is not, on that account, incompetent, provided it appears from the examination of those who are acquainted with his habits that he has a due sense of the obligation imposed upon him by his oath or affirmation, and a power of understanding and answering questions (*i*). In this case, some person acquainted with the signs by which he is accustomed to convey his meaning must be sworn truly to interpret between the court and the witness; and being so sworn (*k*), must first interpret and explain to him the oath or affirmation, and inform the court that he understands and accepts it; and then must interpret to him the questions asked, and return his answers as he gives them. In cases of great importance, where a child, who is a necessary witness to support the charge, is found unfit to give evidence from the mere absence of instruction, a judge will sometimes postpone the trial till the next assizes, and order the prisoner to be detained in custody, in order that the child may be properly taught in the interval (*l*). But since the Oaths Act, 1888 (*ante*, p. 241), the occasion for taking such a course seems scarcely likely to arise, as it is no longer necessary for a witness to have a religious belief, and a belief in spiritual rewards and punishments is therefore no longer a necessary qualification, and that Act seems to apply equally to children as to adults; and if it should be considered necessary, in the case of a child of tender years, that it should at least have an intelligent appreciation of its liability to be punished for perjury in this world, it is not easy to conceive a child of intelligence sufficiently advanced to give an intelligent account of the facts to which it is called to depose, who could not

(*g*) *Brazier's case* (1779), 1 Lea. 199. The mere want of religious belief, since the Oaths Act, 1888 (51 & 52 Vict. c. 46, s. 1), is only relevant to the question whether the witness should be sworn, or should be permitted to affirm under that Act.

(*h*) *R. v. Hill* (1851), 2 Den. C. C. 254.

(*i*) *R. v. Ruston* (1786), 1 Lea. 408.

(*k*) See form of oath, *ante*, p. 218.

(*l*) *R. v. Baylis* (1849), 4 Cox, C. C. 23; note to *R. v. White* (1786), 1 Lea. 430.

readily be made to understand its liability to punishment for lying.

Mode of
swearing
witnesses.

The common and regular way of swearing by a Christian is on the four Evangelists, viz. the New Testament (*m*). All witnesses, indeed, must be sworn after a form, the obligation of which they acknowledge; as a Jew on the Pentateuch or Old Testament, with his head covered (*n*); a Mahometan on the Koran (*o*); a Gentoo, by touching with his hand the foot of a Brahmin or priest of his religion; a Brahmin, by touching the hand of another such priest (*p*); a Chinese, by breaking a china saucer (*q*); a Scotch covenantor, or member of the kirk, by holding up the hand without kissing the book (*r*).

Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, shall not for any purpose affect the validity of the oath (Oaths Act, 1888, 51 & 52 Vict. c. 46, s. 3). It is submitted, therefore, that it is no longer permissible to ask a witness, sworn in the usual form, whether he holds such oath binding on his conscience, as was formerly permissible (*s*).

(*m*) See *per* Lee, C. J., *R. v. Bosworth* (1738), Stra. 1114; citing 1 Eliz. c. 1, s. 19. The abjuration oath was "on the true faith of a Christian," till altered for the Jews by 10 Geo. 1, c. 10, *S. C. Semble*, the swearing on a common prayer book with the four Gospels in the same cover will suffice in order to an indictment for perjury: *Robeley v. Langston* (1667), 2 Keb. 314.

(*n*) *Gomez Serra v. Munez* (1728), Stra. 821. See *ibid.* 1113, and *Robeley v. Langston*.

(*o*) *R. v. Morgan* (1764), 1 Lea. 54. In this case the witness first placed his right hand flat upon the book, put the other hand to his forehead, and brought the top of his forehead down to the book and touched it with his head. The Moulvi Rafiuddin Ahmed (Barrister-at-Law, of the Middle Temple) has kindly informed the editors of the present edition that the mode above described is not uncommon, but that the more usual course is for the witness to repeat the words of the oath, placing his right hand upon the book meanwhile.

(*p*) *Omichund v. Barker* (1744), Willes, 549.

(*q*) *R. v. Entrehman* (1842), C. & Mar. 248. The witness upon going into the witness-box immediately kneels down, and is then handed a saucer, which he strikes upon the front of the witness-box and breaks. The crier of the court who swears the witnesses then administers the oath in the following words, which, where necessary, are interpreted: "You shall tell the truth and the whole truth; the saucer is cracked, and if you do not tell the truth your soul will be cracked like the saucer."

(*r*) *R. v. Mildrone* (1786), 1 Lea. 412; *Dr. Owen's case* (1657), 2 Sid. 6; *Mee v. Reid* (1790), 1 Peake, N. P. C. 33; *R. v. Walker* (1788), 1 Lea. 498.

(*s*) Before this statute if a witness took the oath in the usual form, without objection, he might be afterwards asked whether he thought the oath binding on his conscience, but he could not be asked if he considered any other form of oath more binding. This was the opinion of the judges who advised the House of Lords in *The Queen's case* (1820), 2 Br. & B. 284; and the ground upon which, before the statute, the second question was held irrelevant would seem to require the exclusion, since the sta-

In cases of personal violence or wrong the wife is from necessity a competent witness against the husband, and the husband against the wife (*t*); thus, the wife has been admitted to give evidence against her husband, on a charge against him for attempting to poison her, or for assaulting or assisting in a rape on her (*x*); or on any other charge affecting her liberty and person (*y*), *e.g.*, a charge of conspiracy to effect the marriage of a minor by unlawful means (*z*).

In cases of personal violence.

No other tie except that of marriage, nor any relationship, however near, ever disqualified a witness. A parent might be a witness for or against a child, brothers and sisters for or against each other, and parties who had cohabited for however long a time without marriage; and each of these might be compelled to give evidence against the party to whom he or she is related. Where a witness for the prosecution was examined on the *voir dire* by one of the prisoners, and deposed that she was married to one of them, it was held proper that the prosecution should further examine as to whether the prisoner to whom the witness was married had not previously married a sister of the witness who had died before the second marriage, and upon her answering in the affirmative her evidence was held admissible (*a*).

Proof of relationship.

An accomplice, though brought in custody, and giving evidence under the expectation of a pardon, was always a competent witness. The usual mode of admitting him to give evidence is on the motion of counsel, who, having read the depositions, takes on himself the responsibility of stating to the court, that in his judgment it is necessary to the ends of justice that the accomplice should go before the grand jury. As that course is for the justification of the gaoler, for carrying the witness who happens to be in his custody before them, it is no objection to the evidence of an accomplice that he has been irregularly and improperly taken before the grand jury (*b*). Indeed, the implied condition of pardon under which an accomplice makes his disclosure is, not that the prisoner shall be convicted, but that he shall give a candid and fair account of the transaction; where he does this to the satisfaction of the court, he will receive his pardon, though

Competency of accomplice.

tute, of the first question also. See also *Edmonds v. Rowe* (1824), Ry. & M. N. P. C. 77; *R. v. Gilham* (1795), 1 Esp. 286; *Sells v. Hoare* (1822), 3 Br. & B. 232.

(*t*) *R. v. Jagger* (1796), 1 East, P. C. 455; *R. v. Pearce* (1840), 9 C. & P. 667.

(*x*) Bull. N. P. 187; *Castlehaven's (Lord) case* (1631), 1 Hale, 301.

(*y*) *Per* Hullock, B., in *R. v. Wakefield* (1827), 2 Lewin, C. C. 279; *Castlehaven's (Lord) case, sup.*; *R. v. Fullwood* (1661), Cro. Car. 488; *Brown's case* (1672), 1 Hale, 301.

(*z*) *R. v. Wakefield, sup.*

(*a*) *R. v. Young* (1851), 5 Cox, C. C. 296.

(*b*) *R. v. Dodd* (1777), 1 Lea. 155.

there should be an acquittal; and, on the other hand, if he obstinately prevaricates, he may be ordered into custody, indicted, tried, and punished (c). If a committal takes place on the evidence of an accomplice, the accomplice should also be committed, and not allowed to go on bail, because he is so likely to abscond (d).

In order to identify prisoners, a witness may be asked in direct terms whether any of the prisoners being tried is the person he means (e).

Parties jointly
indicted, how
made wit-
nesses.

Before the Criminal Evidence Act, 1898, one of several defendants standing jointly indicted, and on his trial, was not a competent witness *for his fellows* (f). Now, by that Act (sect. 1), "every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness *for the defence* at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided (a) that a person so charged shall not be called as a witness *except upon his own application*; (c) the wife or husband of the person charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged." It is submitted that "for the defence" in sect. 1 means "for the defence of the person charged," and that an accused person is not entitled to take advantage of the Act to go into the witness-box for the mere purpose of giving evidence on behalf of a fellow-prisoner; nor, when giving evidence, to insist upon giving evidence clearly relative exclusively to the case of a fellow-prisoner. But, unless the evidence tendered by the prisoner very clearly has no tendency to benefit his own case, the court, it is submitted, ought not to interfere. But where there is no case for the jury against one party, the court may, in its discretion, allow of his acquittal at any time after the close of the case for the prosecution and before the reply, in order that he may be examined as a witness for the other defendants; and it is submitted that the weight of authority is in favour of the proposition that where there are several prisoners, if at the close of the case for the prosecution no case has been made as regards one of them, that one is *entitled as of right* to an acquittal, and may not be kept upon his trial until the end of the case; and, upon being so acquitted, he may be called by his fellow-prisoners to give evidence for them (g).

(c) *R. v. Rudd* (1775), 1 Lea. 115.

(d) *R. v. Beardmore* (1836), 7 C. & P. 497.

(e) *R. v. Watson* (1817), 2 Stark. N. P. C. 116, 128.

(f) *R. v. Payne and others* (1872), L. R. 1 C. C. R. 349.

(g) *Child v. Chamberlain* (1834), 6 C. & P. 213; *Russell v. Rider* (1834), 6 C. & P. 416; and see *King v. Baker* (1834), 2 A. & E. 333. The authorities *contra* are *Emmett v. Butler* (1817), 7 Taunt. 607; *Wright v.*

We have seen that the counsel for the *prosecution* in misdemeanour is entitled, before he opens his case, to obtain from the jury an acquittal of any of the defendants against whom he declines to offer evidence, proposing to examine them as witnesses (*h*). A witness may be heard for the defence, though himself charged with a participation in the crime, if he be not included in the same indictment (*i*), or for the prosecution on one count of an indictment, though his wife be charged with participation in the crime if she be not included in the same count; but though jointly indicted for felony, if one alone be given in charge to the jury, the other is an admissible witness (though neither acquitted nor convicted, and though a *nolle prosequi* has not been entered) upon the trial of the prisoner with whom the jury are charged (*k*).

The judge is to determine the question of the competency of the witness, and if he has in the first instance decided in the affirmative, and the witness has been sworn, but in the course of the examination facts are ascertained upon which he forms the opinion that the witness is incompetent, he is at liberty to stop the further examination of the witness and withdraw the evidence of such witness entirely from the jury, and leave the case to them solely upon the other evidence in the case (*l*).

Question of competency is for the judge at the trial.

SECTION 10.

OF CALLING AND EXAMINING WITNESSES.

It is frequently requested by one party, at the commencement of the trial, that the witnesses may withdraw, in order that they may not hear the examination of each other, or the

Withdrawal of witness out of court.

Paulin (1824), Ry. & M. N. P. C. 128; *Wynne v. Anderson* (1829), 3 C. & P. 596; *Sowell v. Champion* (1837), 6 A. & E. 415.

(*h*) *R. v. Rowland et al.* (1826), Ry. & M. N. P. C. 401. *Ante*, p. 244.

(*i*) Three were severally indicted (as they must be) for perjury in the same deposition; two who had pleaded, but were untried, were held good witnesses on the first trial for the defendant, however strong their bias, having no legal interest in that issue: 1 Hale, 305. A. and B. were jointly indicted for breaking into the house of J. H. and stealing his goods therein. A. pleaded "guilty," B. "not guilty," and was tried. A.'s plea of "guilty" was recorded, but no sentence had been passed on him. Coleridge, J., held B. was entitled to call A. as a witness for himself: *R. v. George and Ford* (1841), C. & Mar. 111.

(*k*) *Winsor v. The Queen* (1866), 35 L. J. M. C. 161. It is submitted that these cases have not been superseded by the Criminal Evidence Act, 1898, that Act applying only to prisoners giving evidence *on their own application and on their own behalf*; these cases dealing with accused persons giving evidence *on behalf of others* accused of the same crime and being called as witnesses by them.

(*l*) *R. v. Whithead* (1866), 35 L. J. M. C. 186.

speeches of counsel. This request is always complied with (*m*); and is often accompanied by an intimation from the court, that if any witnesses should remain, in disobedience of its order, they will not be permitted to give evidence (*n*). But where a witness does so remain, it is difficult to show by what authority a court can deprive either litigant party, not implicated in such misconduct, of testimony to which he is otherwise by law entitled. Were the law so, the result would be that reluctant witnesses would avoid the necessity of giving evidence, by disobeying the order of the court, and intimating that disobedience to the party against whom their evidence, if examined, must be given, but whom they wish to favour; accordingly it is submitted that the testimony of such a witness cannot be excluded, though he may be committed for contempt, and his wilful disobedience of the order of the court calls for remarks on the value of his evidence (*o*). By the uniform practice of all courts, the attornies on both sides, whose presence is necessary to the conduct of the case, are excepted from the general order (*p*); and it is usual to extend the same indulgence to witnesses who are merely to prove matters of form, to medical witnesses, and to witnesses intended to depose to character only.

Calling
witness on his
recognizance.

If witnesses, when called, do not appear, they may be called on their recognizances if bound over to give evidence, or on their subpœnas if subpœnaed to attend, with a view to ulterior proceedings against them. Where the absconding or absence of a material witness for the prosecution can be traced to the acts or connivance of the prisoner or his friends, the trial may, in the discretion of the judge, be postponed (*q*), and in such case the prisoner will not be discharged on his own recognizance only, but two other persons may be required to enter into heavy recognizances for his appearance; while in cases where no such collusion appears, he is usually discharged on his own recognizance only (*r*).

(*m*) *R. v. Murphy* (1837), 8 C. & P. 297, 307. "It is almost a right." *S. C.*

(*n*) When judges have refused to hear the witness, it has been as a mere act of their discretion, and not required as a right by counsel: *R. v. Wylde* (1834), 6 C. & P. 380; *Beamon v. Elliee* (1831), 4 C. & P. 585; *R. v. Colten* (1829), M. & M. 329.

(*o*) *Chandler v. Horne* (1842), 2 M. & Rob. 423. In this case Erskine, J., stated that this view had the concurrence of all the judges at that time (*i. e.* 1842).

(*p*) *Per Littledale, J., Pomeroy v. Baddeley* (1826), Ry. & M. N. P. C. 430; *Everett v. Lowdham* (1831), 5 C. & P. 91; but *R. v. Webb* (1819), 3 B. & B. 228, *contra*.

(*q*) See *ante*, p. 224.

(*r*) *Per Patteson, J., in R. v. Beardmore* (1836), 7 C. & P. 497. Indictment for felony was not preferred on account of absence of an accomplice sworn to be a material witness, and that his attendance at the next assizes might be insured. (The affidavit was by the committing magistrate; but *sensu* should have been by the prosecutor or his attorney.)

The means of securing the attendance of witnesses has been considered already (*s*); the expenses of their attendance will be included in the consideration of costs (*t*). In civil cases, a witness who has come from a distance may refuse to be sworn till his expenses are paid or secured; but no witness has a right to make this demand in criminal cases (*u*). Witnesses who have been regularly subpoenaed or bound over ought to *attend*, although they may have reason to think that they will be prevented from giving evidence by a valid objection to their competency, and if subpoenaed to produce documents, ought to *bring them*, though they may be committed to their care under circumstances which may ultimately excuse them from producing them, it being for the judge, and not for the witness, to decide as to such a matter (*x*). And, therefore, where a prisoner was indicted for stealing certain clover seed, the property of a woman who had been bound over by recognizance to give evidence, and, before the trial, she became the wife of the prisoner, on her failing to appear, Lord Ellenborough refused to discharge her recognizance, although he admitted that if she had appeared she could not have been examined against her husband (*y*). Any person present in court and called as a witness is bound, in a criminal case, to take the oath, or affirmation, and give his evidence, though he has not been subpoenaed (*z*); and a witness, being sworn and having a document in his possession in court, was held bound to pro-

Calling witnesses on their subpoena.

After the grand jury were discharged, the prisoner was discharged on entering into his own recognizance to appear at the next assizes, and answer such charges as should be there put against him, particularly as to stealing two rams.

In *R. v. Parish* (1837), 7 C. & P. 782, indictment for forging the acceptance of Tyler, just before the prisoner was put to the bar, Tyler was called on his recognizance, but did not answer. It appeared on affidavit of the prosecutor, that Tyler had applied to the prosecutor to settle the matter without a trial, saying money should not be wanting if it could be settled. The judge remanded the prisoner till the next assizes, unless he entered into recognizance of 100*l.*, with two sureties at 50*l.* each, for appearing there, giving seven days' notice of bail to the magistrates.

The only exception to the practice stated in the text seems to be in capital cases, or (it is submitted) cases of great enormity; but as such cases are not within the jurisdiction of quarter sessions, the practice, so far as those courts are concerned, is as stated. For these excepted cases, see *R. v. Chapman* (1838), 8 C. & P. 558; *R. v. Owen* (1839), 9 C. & P. 86; *R. v. Bowen* (1840), 9 C. & P. 509.

(*s*) *Ante*, Chap. II.

(*t*) *Post*, Sect. 14, p. 372.

(*u*) *R. v. Cooke* (1824), 1 C. & P. 321; and see *ante*, Chap. II.

(*x*) *Amev v. Long* (1828), 9 East, 473; *R. v. Greenaway* (1845), 14 L. J. M. C. 190.

(*y*) Chelmsford Assizes, 1817, Dickenson's MSS., 3 Dick. Pract. Expos. 935.

(*z*) *R. v. Sadler* (1830), 4 C. & P. 218. An indictment for stopping a way is a criminal case for this purpose.

duce it, though he had not been served with a subpoena *duces tecum* (a). A witness producing documents merely under a subpoena *duces tecum* need not be sworn if the party who calls him does not wish to examine him (b); and if he is sworn by mistake, and a question put to him which he does not answer, the opposite party is not entitled to cross-examine him (c).

Witnesses,
how called by
counsel.

The witnesses are called by the counsel on either side in the order in which they deem proper. Where there is more than one counsel on a side, they usually examine in turn; but this is mere matter of arrangement among themselves, not subject to any interference from the adversary or the court; and a leading counsel may not only take the examination of such witnesses as he thinks fit on himself, but may take a witness out of the hands of his junior after an examination has begun (d).

As to calling
all witnesses
on back of the
indictment.

Where any witness on the back of the indictment has not been called, the court in the exercise of its discretion may, and in a case of felony generally will, require him or her to be called into the box, that the prisoner may have the opportunity of cross-examining (e); and any examination to which such witness may be subjected for the prosecution after being so cross-examined must be treated as a mere re-examination, limited to the points on which he has been cross-examined (f). In cases of misdemeanour, it is usual to leave the defendant to take the responsibility of calling such persons as *his own* witnesses, if he thinks they can depose anything in his favour; in neither class of cases is there any objection to calling and examining witnesses at the trial who have not been before the grand jury, or whose depositions have not been taken, but where such witnesses are called, it is generally proper to give a copy of their evidence to the accused a reasonable time before the case is tried, and if this course is not pursued it is open to legitimate observation, but, it is submitted, affords no ground for excluding the evidence.

Privilege of
attornies, &c.
and witnesses
not to answer

In general, a witness may be examined as to all matters which are not privileged from disclosure for the sake of others, or which do not tend to show that he has himself

(a) *Snelgrove v. Stevens* (1842), Car. & M. 508.

(b) *Davis v. Dale* (1830), Moo. & M. 514; *Perry v. Gibson* (1834), 1 A. & E. 48; *Summers v. Moseley* (1834), 2 Cr. & Mee. 477.

(c) *Rush v. Smith* (1834), 1 C. M. & R. 94.

(d) *Doe v. Roe* (1809), 2 Campb. 280.

(e) *R. v. Barley* (1847), 2 Cox, C. C. 191. But this is not of course even in felony, so as to entitle the prisoner to call on the prosecutor's counsel to do so: *R. v. Vincent and others* (1839), 9 C. & P. 91; *R. v. Edwards* (1848), 3 Cox, C. C. 82; *R. v. Simmonds* (1823), 1 C. & P. 84; *R. v. Bull* (1839), 9 C. & P. 22; *R. v. Bodle* (1833), 6 C. & P. 186.

(f) *R. v. Beezley* (1830), 4 C. & P. 220.

been guilty of an indictable offence, or of some conduct which will render him infamous. But a legal adviser, be he counsel, solicitor, or attorney, is precluded from disclosing communications imparted to him on the faith of his character as such, by or on behalf of his client (*g*), either of necessity, in reference to a suit or prosecution anticipated or pending, or in the ordinary scope of his professional employment as an attorney (*h*): and the rule is the same, if in the course of such employment he committed them to writing (*h*), or saw a fact done, *e.g.*, the destruction of a document which he had prepared and attested as such (*i*). In every case the privilege is that of the client, not of the witness, who may accordingly be stopped, even if he does not object to answer (*k*). However, if the client himself examines his attorney as to a matter which has been the subject of confidential communication, he waives the privilege and opens all communications on that subject to the cross-examining counsel (*l*); and an attorney may depose to facts, his knowledge of which was obtained by means independent of any confidence reposed in him as such, *e.g.*, before his retainer began, or since it ceased (*m*), or to the execution of a document which he has attested, for, by attesting a document he undertakes to give evidence of its execution whenever called upon to do so (*n*).

The privilege (or disability) alluded to is extended to the clerk of an attorney (*o*); to an agent of an attorney (*p*); to an interpreter between an attorney and client (*q*); and to a barrister's clerk, if it is proposed to examine him as to the time when a particular retainer was delivered for his master (*r*). And the rule of privilege applies as between a Scotch agent and his client equally as between an English solicitor and his

(*g*) Taylor on Ev. 9th ed. § 911.

(*h*) See *Ld. Ch. Brougham's judgment in Greenough v. Gaskell* (1833), 1 Myl. & K. 98, after consulting *Tindal, C. J., Lord Lyndhurst, C. B., and Parke, B.* And see by *J. Parke, J., Moore v. Terrell* (1833), 4 B. & Ad. 876; *Cromack v. Heathcote* (1820), 2 Br. & B. 4; *Bray v. Aekermann* (1804), 5 Esp. 119; *Robson v. Kemp* (1803), *id.* 52; *Walker v. Wildman* (1821), 6 Madd. 47; *Williams v. Mundie* (1824), Ry. & M. N. P. C. 34; *Clark v. Clark* (1830), 1 M. & Rob. 3; *R. v. Withers* (1811), 2 Campb. 578; *Turquand v. Knight* (1836), 2 M. & W. 98; *Gillard v. Bates* (1840), 6 *id.* 548. See a case where facts came to the witness's knowledge while acting as solicitor, though not communicated to him by his client: *Desborough v. Rawlins* (1838), 3 Mylne & Cr. 515.

(*i*) *Robson v. Kemp, ubi sup.*

(*k*) *Wilson v. Rastall* (1792), 4 T. R. 759.

(*l*) *Faillat v. Doddehead* (1743), 2 Atk. 524.

(*m*) *Cuts v. Pickering* (1670), 1 Vent. 197; *Cobden v. Kenrick* (1791), 4 T. R. 431.

(*n*) *Doe v. Andrews* (1778), Cowp. 846; *Robson v. Kemp, sup.*

(*o*) *Taylor v. Forster* (1825), 2 C. & P. 195.

(*p*) *Parkins v. Hawckshaw* (1817), 2 Stark. N. P. C. 239.

(*q*) *Du Barré v. Livette* (1791), Peake, N. P. C. 108.

(*r*) *Foot v. Hayne* (1824), Ry. & M. N. P. C. 165.

client(s). But if a person, who is not an attorney, has been consulted under the erroneous impression that he is one, he will be obliged to disclose all that was told him by a party under that error(t). Nor does this anomalous rule extend beyond the above legal persons. Thus, physicians(u), bankers(x), stewards(y), clergymen(z), popish priests(a), and private friends (including in this term persons who are solicitors, but are consulted as private friends and not professionally)(b), have been compelled to disclose on their oaths matters learnt by them, either from intimacy, or in their professional character. Even a clerk to the commissioners of property tax has been compelled to state facts with which he became acquainted in his official character, though sworn to conceal them; for the Tax Act must be taken to have excepted evidence given by a witness in a court of justice under a subpoena(c).

Questions
witness not
bound to
answer.

Subject to the provisions of the Criminal Evidence Act, 1898, with reference to the prisoner, and his or her wife or husband (*ante*, p. 301), a witness is privileged from answering any question, the answer to which would tend to expose him(d), or the husband or wife of the witness(e), to a criminal charge(f), or to a penalty or forfeiture, unless the time for recovering it has expired(g). But a witness is not privileged from answering any questions which may produce answers merely degrading to his character, or going to his credit, where the question is directly material to the issue(h); but where the question goes to the credit only of the witness, and is not material to the issue, it is doubtful whether the witness is compellable to answer(i). No answer forced from a witness who has reasonably declined to answer, after he has claimed his privilege, can be afterwards given in

(s) *Lawrence v. Campbell* (1859), 28 L. J. Ch. 780.

(t) *Fountain v. Young* (1807), 6 Esp. 113.

(u) *R. v. Kingston (Duchess)* (1776), 20 How. St. Tr. 612.

(x) *Loyd v. Freshfield* (1826), 2 C. & P. 325.

(y) *Vaillant v. Dodemead* (1743), *ubi sup.*

(z) *Gilham's case* (1828), 1 Moo. Cr. C. 186; *per Best, C. J.*, in *Broad v. Pitt* (1828), 3 C. & P. 519; *R. v. Sparkes* (1791), cited in *Du Barré v. Livette* (1791), 1 Peake, 108; and see *Taylor on Ev.* 9th ed. § 879.

(a) *Butler v. Moore* (1802), MacNally, 253; *R. v. Hay* (1860), 2 F. & F. 4.

(b) *Lord Russell's Trial* (1683), 9 How. St. T. 599; *Wilson v. Rastall* (1792), 4 T. R. 760.

(c) *Lee v. Birrell* (1813), 3 Campb. 337.

(d) *R. v. Garbett* (1847), 1 Den. C. C. 236.

(e) *R. v. All Saints, Worcester* (1817), 6 M. & S. 200; *per Bayley, J.*, *Cartwright v. Green* (1803), 8 Ves. 405.

(f) *Cates v. Hardacre* (1811), 3 Taunt. 424.

(g) *Roberts v. Allatt* (1828), M. & M. 192. See *R. v. England* (1796), Lea. 767.

(h) *Taylor on Ev.* 9th ed. §§ 1459, 1460; *R. v. Hay*, *ubi sup.*

(i) *Taylor on Ev.* 9th ed. § 1460.

evidence against him (*k*), though the inquiry ought not to be pursued after the witness has once objected. A Roman Catholic priest cannot decline to say from whom he received property alleged to be stolen, on the ground that he obtained it through the confessional (*l*). In a case in which a witness for the prosecution refused to answer a question on the ground that it would tend to criminate him, counsel for the prisoner (Brougham), in addressing the jury, contended that the refusal of the witness to answer amounted to an admission that he had been concerned in the criminal transaction suggested, for that a denial of it, if he could have denied it, would not have injured him; but Lord Tenterden interposed, saying that no such inference ought to be drawn, and that there would be an end of the protection of the witness if a demurrer to the question were to be taken as an admission of the fact inquired into (*m*). It is, however, submitted that the refusal of a witness to answer a question on such a ground is a legitimate subject for comment by the opposing counsel, notwithstanding Lord Tenterden's ruling to the contrary (*n*).

(*k*) *R. v. Garbutt* (1847), 1 Den. C. C. 236.

(*l*) *R. v. Hay* (1860), 2 F. & F. 4.

(*m*) *Rose v. Blakemore* (1826), Ry. & M. N. P. C. 383.

(*n*) The learned reporters of *Rose v. Blakemore*, in a note to that case (*ubi sup.*), refer to *R. v. Watson* (1817), 2 Stark. N. P. C. 158, where Holroyd, J., is reported to have said:—"I have understood the rule to be, that if you propose a question to a witness and he declines to answer it, his not answering can have no effect with the jury," and to Lord Eldon's opinion in *Lloyd v. Passingham* (1809), 16 Ves. 64, to the same effect, and observe that, "notwithstanding the deference due to these high authorities, it may, perhaps, be doubted whether these *dicta* be not inconsistent with the general principles on which the right of witnesses to refuse an answer to questions have been established."

The following observations may be made upon the authorities cited by Messrs. Ryan and Moody, which, if well founded, support their view:—In *R. v. Watson* (1817), as a set-off against the *dictum* of Holroyd, J., Bayley, J., said: "He" (*i.e.*, the witness) "may demur to the question, for he is not bound to criminate himself: and if he refuse, this is not without its effect with the jury." And *Lloyd v. Passingham* was a case of a demurrer to a bill in equity for discovery, where the objection to answer was taken by the party from whom discovery was sought, who would seem to be in a different position from a witness testifying in open court on a criminal trial. Lord Eldon's words seem to show this. He said:—"I protest strongly against the doctrine that R. P., having demurred to so much of the bill as seeks a discovery of facts, which have a tendency to affect him criminally, is on that account to be considered as admitting the allegations of the bill."

The learned reporters of *Rose v. Blakemore* continue:—"It seems open to contend that there is no reason why comments should not be made on the fact of the witness's refusal to answer, with a view to satisfy the jury of the truth of the fact suggested by the question. It would seem that the witness is sufficiently secured from penalties, punishment or forfeiture, if he is not compelled to say anything which would be evidence against him in proceedings instituted with those objects; and as neither the inferences of counsel, nor the opinion of the jury, could have that effect, it appears as unreasonable to prevent counsel from drawing the one, as it is impossible to prevent the jury from forming the other."

Party asking,
bound by wit-
ness's answer,
when.

The question may arise in the case of the prisoner himself, when giving evidence on his own behalf, equally as in the case of any other witness, where cross-examination becomes permissible as to the commission by the prisoner of offences other than that for which he is being tried, under sect. 1 (f) of the Criminal Evidence Act, 1898. The witness must object, not the counsel(*o*). If the witness chooses to answer, he must answer throughout(*p*); but unless the matter directly relates to the subject of the trial, the party asking the question is bound by his answer, and cannot give evidence to contradict him on the collateral issue, which he, or those who call him, may not be prepared to enter upon(*q*). But by 28 Vict. c. 18, s. 6, proof may be given of the witness having been convicted of a crime, if, being asked the question, he denies it, or refuses to answer.

The question
of privilege
is for the
court.

A witness, however, cannot by law refuse to answer any question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to a penalty or forfeiture, on the sole ground that the answer may tend to establish that he owes a debt, or otherwise to subject him to a civil action(*r*). A witness will not be compelled to produce his title deed(*s*), or to answer matter showing that he has done acts creating a forfeiture of an interest in land(*t*). The witness is not the sole judge of whether his answer is like to put him in peril of proceedings against him; but the court must see from the nature of the case and the evidence he is called upon to give whether he has reasonable grounds to apprehend danger. If that be made to appear to the court, then the witness should be allowed great latitude as to deciding whether the answer he may give forms a link

It is clear that no inference ought to be drawn against a party in a civil action who declines to allow his solicitor to disclose professional communications, or who refuses to disclose communications made by himself to his solicitor professionally (see strong remarks of Lord Chelmsford in *Wentworth v. Lloyd* (1864), 10 H. L. C. 589); and probably, if upon a criminal trial comments were made by counsel upon the non-disclosure of professional communications, the presiding judge would take measures to prevent such comments from being made, or if made from having any undue weight with the jury.

(*o*) *Thomas v. Newton* (1826), Moo. & M. 48; nor will counsel be heard in support of the objection: *R. v. Adey* (1831), 1 M. & Rob. 94. *Quære*, however, whether counsel for the party calling the witness may not caution the witness that he is not bound to answer a criminating question. This was done by Best, Serjt., apparently without objection, in *Cates v. Hardacre* (1811), 3 Taunt. 424, which was tried before Lord Mansfield.

(*p*) *East v. Chapman* (1827), Moo. & M. 47.

(*q*) *R. v. Holmes* (1871), 41 L. J. M. C. 12; 2 Watson's Trial, by Gurney, 288; *Rose v. Blakemore* (1826), Ry. & M. N. P. C. 383; *R. v. Clarke* (1817), 2 Stark. N. P. C. 244, *post*, Sect. XIV., *Verdict*.

(*r*) 46 Geo. 3, c. 37.

(*s*) *Pickering v. Noyes* (1823), 1 B. & C. 262; *R. v. Hunter* (1829), 3 C. & P. 591.

(*t*) *Pye v. Butterfield* (1864), 34 L. J. Q. B. 17.

in a chain of evidence or not (*u*). The danger to be apprehended must be in the ordinary course of things, and not a merely possible but extraordinary proceeding, *e.g.*, impeachment of a witness to whom a pardon under the Great Seal has been granted (*x*).

On the examination in chief, the questions must be pertinent to the matter immediately in issue; and counsel are not in general permitted to ask leading questions, that is, questions which, in their terms, suggest the answers, and to which the answer "yes" or "no" would be conclusive (*y*). But a prisoner who has been described by a witness may be pointed out to him, and he may then be asked in direct terms if that is the person he meant (*z*). Again, where a witness is obviously hostile or unwilling, the court may, in their discretion, allow the examination in chief to assume the form of a cross-examination, and permit the witness to be severely pressed with direct questions on points upon which he seems inclined to palter (*a*). Where a witness gives evidence destructive of the case he was called to prove, the party calling him may, in order to neutralize his statement, show that he had, *before* the trial, given the attorney an account of the transaction entirely different from that sworn to by him *at* the trial.

Of the examination in chief.

But a *party producing* a witness is not allowed to impeach his credit by general evidence of bad character, though by statute he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence, or by leave of the judge, prove that he has made, at other times, a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement (*b*). This section is framed on the 22nd section of the C. L. P. Act, 1854, and under that section it has been held that it applies only when a witness appeared to be, in the opinion of the judge, "hostile," and not merely unfavourable (*c*). This section seems to lay down three rules as to the power of a party to discredit his own witness. (1) He shall not be allowed to impeach his credit by general evidence of his bad character. (2) He may con-

Power of party to discredit his own witness.

(*u*) *Cates v. Hardacre* (1811), 3 Taunt. 424.

(*x*) *R. v. Boyes* (1861), 30 L. J. Q. B. 301.

(*y*) *Nicholls v. Dowding* (1815), 1 Stark. N. P. C. 81, *per* Lord Ellenborough, C. J.: "In general no objections are more frivolous than those which are made to questions as leading ones."

(*z*) *R. v. Watson* (1817), 2 Stark. N. P. 128.

(*a*) *Clarke v. Saffery* (1824), Ry. & M. 126; *R. v. Ball and others* (1839), 8 C. & P. 745, *Erskine and Patteson, JJ.* See *R. v. Farr* (1839), *id.* 768, and *post*.

(*b*) 28 Vict. c. 18, s. 3.

(*c*) *Greenough v. Eccles* (1859), 5 C. B. N. S. 786.

tradict him by other evidence if, in the opinion of the judge, he is a hostile witness. (3) He may, with the leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony. The law as to the first point was settled before; and as to the second it was permissible to contradict him by other evidence relative to the issue; as to the last it was an unsettled point. The rule applies where the witness for the prosecution gives the evidence sought to be discredited on cross-examination, and on re-examination denies having given a different account of the matter spoken to.

To show the contradiction a series of letters may be used where it is intended to convey an impression of the existence of the contradictory fact, though the letters do not directly and positively affirm the fact (*d*).

Leading
questions.

It is usual, also, for convenience sake, to allow in all cases questions merely introductory to be put in a leading form; and where the matter is really not essential, or disputable, an objection to such questions ought to be discouraged as vexatious (*e*). A counsel should also, except in peculiar cases, be permitted to lead to the *matter* as to which he is instructed to examine, though not to the *answer*; for otherwise the time of the court may be occupied with hearing wholly irrelevant facts and conversations. On this subject, it is impossible to lay down any general rule: on the one hand, any attempt to suggest the answer, where that answer is material, ought to be vigilantly repressed; but, on the other, objections to questions which merely tend to confine the witness to the subject-matter of inquiry, or which even lead him as to introductory matters, should be repressed by the court as tending to introduce perpetual discussions, to waste the time of the public, and distract the attention of the jury. After exhausting a witness's memory as to the contents of a letter which is destroyed or lost, he may be asked, in examination in chief, if it contained a particular passage recited to him, which it had been sworn on the other side that it did; or it would be impossible ever to come to a direct contradiction of the adversary's evidence on that subject (*f*). A leading question must be objected to immediately; and if a witness is asked as to any statement having been made, which the opposite counsel believes to have been in writing, he should immediately interpose by asking whether it was in writing, or by word of mouth only, for if in writing, it must be produced (*g*).

Leading
questions.

(*d*) *Jackson v. Thomason* (1861), 31 L. J. Q. B. 11.

(*e*) *Nicholls v. Dowding* (1815), 1 Stark. N. P. 81, *per* Lord Ellenborough.

(*f*) *Courteen v. Touse* (1807), 1 Campb. 44, *per* Lord Ellenborough.

(*g*) *The Queen's case* (1820), 2 Br. & B. 292.

A witness may refresh his memory by written entries of his own or others, subject to certain restrictions. Thus, where a witness speaks to specific facts (*e.g.*, dates of the commencement of tenancies), not from his own recollection independently of any writing, but merely from finding such entries of them in a book made by himself and another person in his presence, at the time the facts were ascertained by them, the original book must be produced, and the witness cannot refresh his memory by extracts. The original writing is required to be produced, however, not in order to make it evidence of itself, but that the witness may refresh his memory by every part of it; a benefit to which, as well as that of cross-examining upon it, the other side is entitled (*h*); and such a witness cannot refresh his memory by extracts made by himself, or by any other at a subsequent period (*i*). For the rule that the best evidence must be produced is applicable, whether a paper be produced as evidence in itself, or merely to refresh the memory (*k*); so that the copy of an entry, &c. not made by the witness contemporaneously with his making such entry does not seem admissible for the latter purpose, any more than the copy of an instrument is admissible in evidence where the instrument itself would be the best evidence (*l*). The writing when produced for the purpose of refreshing the memory is not made evidence by being used for that purpose, but still the other side ought to see it (*m*). But a written entry which for want of a stamp is not in itself admissible to prove a specific fact of receipt of money, &c., may be looked at by a witness to refresh his memory of the payment having been made. Thus, when on seeing a written entry the witness said, "The entry of 20*l.* in the plaintiff's book has my initials written at the time; I have no recollection that I received the money: I know nothing but by the book: but by seeing my initials I have no doubt that I received the money;" it was held that the book was properly used to refresh his memory, and that his saying afterwards that he had no doubt that he received it, was sufficient parol evidence of such receipt, without using the unstamped entry to prove it (*n*).

Refreshing memory by reference to entries, &c.

A clerk to a tradesman was called for his master to prove the ordering and consequent delivery of goods to the defen-

(*h*) *Doe d. Church v. Perkins* (1790), 3 T. R. 749; see Pattenon, J., *R. v. St. Martin's, Leicester* (1834), 2 A. & E. 215; and see *Burrough v. Martin* (1809), 2 Campb. 112.

(*i*) *Ibid.*; *Burton v. Plummer* (1834), 2 A. & E. 343.

(*k*) *Per* Pattenon, J., in *Burton v. Plummer*, *ubi sup.*

(*l*) *Ibid.*

(*m*) *R. v. St. Martin's, Leicester*, *sup.* See *R. v. Duncombe* (1838), 8 C. & P. 369; *post*, p. 323.

(*n*) *Maugham v. Hubbard* (1828), 8 B. & C. 14; *Rambert v. Cohen* (1802), 4 Esp. N. P. C. 213; *Jacob v. Lindsay* (1801), 1 East, 460.

dant. The clerk entered orders as they appeared in a waste book from his own knowledge. The tradesman copied the entries day by day into a ledger, in the presence of the clerk, who checked them as they were so copied, and thus ascertained their correctness. It was held, that as these entries so checked were in the nature of entries made by the clerk himself, they might be used by him to refresh his memory of the orders, without producing the waste book, or accounting for its absence (*o*). For they are held in the nature, not of copies, but of original and contemporaneous memoranda made by the witness himself, though not with his own hand. This last circumstance is never held essential. Thus, in the case of a log book produced to refresh the memory of a witness as to a particular voyage, he said he had not written the entries himself, but had from time to time examined them while the events recorded were fresh in his recollection, and always found them correct; for not only were the occurrences recent, but he had ample opportunity to have corrected the entries if wrong (*p*).

Of the cross-examination.

On cross-examination, a much greater latitude is necessarily allowed than in examining in chief, though since the prisoner's counsel may in all cases address the jury, it is no longer proper to carry cross-examination to that length, which was only excusable while it was the only mode of suggesting an important view of the case to the minds of the jury. Leading questions may be asked; but the witness must not, even when cross-examined, be supplied with the very words he is desired to echo (*q*), unless he is so cross-examined with a view to contradict him, as, *e.g.*, to show that he has used particular words which he swears he did not. And now, by statute 28 Vict. c. 18, s. 4, if a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding, and inconsistent with his present testimony, does *not distinctly admit* that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement.

Contradiction of witness by his own former statements.

This section cannot be made use of to enable a party to contradict his own witness (*r*).

(*o*) *Burton v. Plummer* (1834), 2 A. & E. 341.

(*p*) *Burrough v. Martin* (1809), 2 Campb. 112. The questions there put under Lord Ellenborough's sanction were, 1st, whether the witness saw in the log book an entry of a stated date at a time when he had a memory of the fact stated in it; and, 2ndly, whether, looking at the entry, he could now state positively on his oath when the ship arrived at her port of destination.

(*q*) *R. v. Hardy* (1794), 24 How. St. Tr. 755.

(*r*) *Ryberg v. Ryberg* (1863), 32 L. J. P. & M. 112.

Where it is proposed to contradict a witness by something which he has written, or which has been reduced into writing, he may be cross-examined as to the contents of the paper, without the paper itself being shown to him, and, on his admitting the handwriting, it may be read as the evidence of the cross-examining party, either at that time, or when he calls his witnesses; for by 28 Vict. c. 18, s. 5, it is enacted, that a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him. Provided always, that it shall be competent for the judge at any time during the trial to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he may think fit (*s*).

Contradiction of witness by his own writing.

Since this statute it is no longer the practice to have the depositions read as part of the evidence of the cross-examining counsel before cross-examining as to the making of any statement in the depositions, as was formerly the case under the rules laid down by the judges, as stated in 7 C. & P. 676.

It is permissible to ask a witness upon his cross-examination, with a view to impeach his credit, whether there had not been proceedings in an action against him in the county court in respect to a similar claim to the one then being tried, which he had resisted, and upon which he had given evidence, and the jury, notwithstanding, had found their verdict against him, without producing or proving the record of the proceedings in the county court (*t*), and probably the same would have been held if the witness had been a third person. In that case the witness answered the question, so that it must not be taken that if the witness had objected to answer he would have been compelled to do so without the record being produced.

By 28 Vict. c. 18, s. 6, a witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other

Cross-examination as to previous conviction of witness.

(*s*) 28 Vict. c. 18, s. 5.

(*t*) *Henman v. Lester* (1862), 31 L. J. C. P. 366. But the record, if produced, would, of course, show nothing as to the nature of the evidence given orally. It would, however, show which way the verdict passed.

officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer (for which certificate a fee of 5s., and no more, shall be demanded or taken), shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same.

If a witness for the prosecution, on cross-examination by the prisoner or his counsel, states that the prisoner bears a good character, the prosecution is at liberty to give evidence of a previous conviction under 24 & 25 Vict. c. 96, s. 116 (*u*).

Under the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1 (*f*), a person charged and called as a witness in pursuance of that Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of, or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

- (1.) the proof that he has committed or been guilty of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
- (2.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution (*x*); or
- (3.) he has given evidence against any other person charged with the same offence.

To whatever point a witness may be called, even if he be merely sworn and not examined in chief, he is open to cross-examination as to every matter relative to the cause (*y*). If a witness admits, that when before the justice he was cross-examined by the prisoner's attorney, his counsel may question him as to the answers he gave on that occasion, if it appears to the court that no such cross-examination has been returned by the magistrate (*z*). To try his memory or his credit, he may be asked as to a former account verbally given by him of the transaction; and hypothetical questions may be put to show the value of any judgment he has formed; but it must not be assumed that he said on his examination in chief what he did not say, nor must anything be suggested as a fact proved which is not in proof.

Cross-

On cross-examination of a prosecutrix on a charge pre-

(*u*) *R. v. Shrimpton* (1851), 21 L. J. M. C. 37.

(*x*) Where prisoner said with respect to the prosecutor's evidence, "No, it is a lie and he is a liar," it was held by the Court of Crown Cases Reserved not sufficient to bring the case within this sub-section: *R. v. Rouse and Burrell*, 20 T. L. R. 68.

(*y*) *Phillips v. Eamer* (1795), 1 Esp. N. P. C. 356.

(*z*) *R. v. Edwards* (1837), 8 C. & P. 26.

ferred by her of indecent assault, she may be asked whether she had not had connexion with a number of persons named to her, being other than the prisoner at other times; but upon such question being put she may refuse to answer. If, however, she answers and denies it, her answer is conclusive as going to her credit only, and she cannot be contradicted by calling the persons named (*a*), though she may be indicted for perjury upon her answer if it be false (*b*); but it appears that if such evidence in contradiction were admitted, though improperly, and an issue were thus raised before the jury as to the credibility of the witness for the prosecution, and the evidence in contradiction appeared to be false, the witness might be indicted for perjury assigned upon their evidence in contradiction (*c*). And now it is clearly decided that every question which goes to credit is material, and it has been held that all false statements wilfully and corruptly made by a witness as to matters which affect his credit are material, and he is liable to be convicted of perjury in respect of such statements (*d*).

examination
as to the wit-
ness's credit.

And where, upon an application for a bastardy order, the complainant is cross-examined as to acts of connexion with other men than the alleged father, at such times as would make it appear that they could not be the father of the child in question, her answer is final, and the men named should not be called in contradiction (*e*); but if the connexion with such persons is alleged to be at a time when the child whose paternity is in question might have been the result, such persons might be called (*f*).

If on cross-examination a paper is put into the witness's hands and questions put on it, and nothing comes of it, the opposite counsel cannot demand to see the paper; but, if anything comes of it, the counsel has a right to see the paper, and re-examine on it (*g*).

A court of quarter sessions has now the power to direct a prosecution for perjury to be instituted, as a judge has at assizes (*h*).

Power to
direct prose-
cution for
perjury.

The task of watching the proofs adduced by prosecutors, and of cross-examining the witnesses, will be materially assisted by the copies of the depositions. To such copies, or to a sight of the originals, the prisoner is now entitled; for

Prisoners
entitled to
copies of depo-
sitions before
the first day
of the sessions.

(*a*) *R. v. Hodgson* (1812), R. & R. 211; *R. v. Holmes* (1871), L. R. 1 C. C. R. 334.

(*b*) *R. v. Overton* (1842), 2 Moo. C. C. 263; *R. v. Lavey* (1850), 3 C. & K. 26.

(*c*) *R. v. Gibbons* (1862), 31 L. J. M. C. 98.

(*d*) *R. v. Baker*, [1895] 1 Q. B. 797.

(*e*) See *R. v. Gibbons*, *ubi sup.*

(*f*) *Garbutt v. Simpson* (1863), 32 L. J. M. C. 186.

(*g*) *R. v. Duncombe* (1838), 8 C. & P. 369; see *R. v. St. Martin's, Leicester* (1834), 2 A. & E. 215, *ante*, p. 319.

(*h*) 14 & 15 Vict. c. 100, s. 19.

by 11 & 12 Vict. c. 42, s. 27, it is enacted, that at any time after all the examinations aforesaid shall have been completed, and before the first day of the assizes or sessions, or other first sitting of the court at which any person so committed to prison or admitted to bail is to be tried, such person may require, and shall be entitled to have, of and from the officer or person having the custody of the same, copies of the depositions on which he shall have been committed or bailed, on payment of a reasonable sum for the same, not exceeding at the rate of three halfpence for each folio of ninety words.

Between first day of sessions and trial.

The interval between the first day of the assizes or sessions, or other first sitting of the court, and the time of the trial is not provided for by statute with respect to this matter, and at common law the prisoner was not entitled to a copy nor to inspection of the depositions at any time (*i*).

Allowing inspection of the depositions at the trial.

And by 6 & 7 Will. 4, c. 114, s. 4, persons under trial shall be entitled, at the time of their trial, to inspect, without fee, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had.

Right of accused to copies of depositions.

The right to the copies of depositions is confined, by 11 & 12 Vict. c. 42, s. 27 (*supra*), in cases where the defendant has been committed to prison, to committals for trial, and therefore does not extend to the case of a party committed in default of finding sureties of the peace to the next session (*k*).

Re-examination.

After the cross-examination is finished, the counsel, by whom the witness was called, is entitled to re-examine, for the purpose of explaining any matter into which confusion may have been introduced by the questions of his adversary. So where a witness has given answers in cross-examination glaringly adverse to the side which called him, he may be asked in re-examination questions tending to show that he has been improperly influenced by the adversary (*l*). But the questions must be confined to matters touched on or referred to in the cross-examination. Where, however, any new matter occurs to the counsel as important, he may request the court to examine respecting it, or allow him to do so; and this indulgence, if properly asked, is always granted. When the questions are put by the court, as is the regular course, it is also of course for the court to put any questions suggested on the new matter by the other side; and when the examining counsel is himself suffered to put them, his adversary has, of course, the right of cross-examining upon them.

Examination by court or jury.

When the examinations of each witness by counsel are concluded, any of the justices or jurors may put such questions as occur to him to be fitting for the further elucidation of the

(*i*) *Per* Lord Kenyon, C. J., in *R. v. Holland* (1792), 4 T. R. 692.

(*k*) *Ex parte Humphrys* (1850), 19 L. J. M. C. 189.

(*l*) *Dunn v. Aslett* (1838), 2 M. & Rob. 122.

matter in issue; and for this purpose, the court may recall a witness at any stage whatever of the inquiry, even after the case for the prosecution is closed, and an objection has been taken to the evidence(*m*). It is right that the prisoner's counsel should be allowed to cross-examine on this evidence(*n*). So a witness may be recalled at request of a juror.

SECTION 11.

OF THE DEFENCE, REPLY, AND SUMMING-UP.

By 3 Edw. 7, c. 38 (Poor Prisoners' Defence Act, 1903), power is given to committing justices, a judge of assize, or chairman of quarter sessions, to certify that a prisoner shall have legal aid in the preparation and conduct of his defence. For text of the Act and notes, see App. E.

By the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 2, where the only witness to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the case for the prosecution. It is to be observed that by sect. 1 (a) of the Act, a person so charged shall not be called as a witness in pursuance of this Act except upon his own application, and that the Act contains no provision for a prisoner undefended by counsel being made acquainted by the court with his right to go into the witness-box if he desires to do so. It is believed to be the general practice of chairmen of courts of quarter session, where a prisoner is not defended by counsel, to inform him at the close of the case for the prosecution that he is entitled to go into the box to give evidence on his own behalf, if he is desirous of so doing; and some chairmen also make it a practice to explain to the prisoner that if he goes into the box he will be subject to cross-examination, and that he may, instead of giving evidence, say what he thinks proper to the jury from the dock.

The only possible objection to this course being adopted is that it directs the attention of the jury to the right of the prisoner to give evidence, and, in the event of his deciding not to do so, may lead the jury to draw an inference adverse to the prisoner, contrary in some sort to the spirit if not to the letter of sect. 1 (a) and (b) of the Act; but this possible objection seems to be outweighed by the following considerations, viz.: (1) That it would seem to be inhumane not to inform a prisoner, who is probably unacquainted with the form of the proceedings, of a right which he may exercise,

(*m*) *R. v. Remnant* (1807), R. & Ry. 136. In criminal cases the practice of judges differs greatly in this respect.

(*n*) *R. v. Watson* (1834), 6 C. & P. 653.

and which may be highly beneficial to himself; and "the judge is of counsel for the prisoner"; (2) the jurymen, or some amongst them, will have been, in all probability, already aware of the right of the prisoner to give evidence on his own behalf; and (3) the prisoner has no absolute right under the Act to prevent the attention of the jury being drawn to his failure to go into the box, inasmuch as it has been held that sect. 1 (b) of the Act only prevents such failure from being commented on by the prosecution, and does not prevent the judge from commenting thereon, if he should think that the interests of justice render it desirable that he should do so; *à fortiori*, therefore, the prisoner can have no right to object to the judge taking a course which only indirectly tends to draw the attention of the jury to the matter. On the whole, therefore, it is submitted that the practice referred to is unobjectionable, and, indeed, highly proper.

Duty of chairman on close of prosecution.

If the prisoner does not elect to give evidence, the chairman, in all cases where the prisoner has no counsel, asks him what he has to say in answer to the charge.

Duty of chairman or judge where prisoner defended by counsel.

Subject to the provisions of the Criminal Evidence Act, 1898, if any prisoner or prisoners, defendant or defendants, shall be defended by counsel, but not otherwise, it shall be the duty of the presiding judge, at the close of the case for the prosecution, to ask the counsel for each prisoner or defendant so defended by counsel, whether he or they intend to adduce evidence; and in the event of none of them thereupon announcing his intention to adduce evidence, the counsel for the prosecution shall be allowed to address the jury a second time in support of his case, for the purpose of summing up the evidence against such prisoner or prisoners, or defendant or defendants; and upon every trial for felony or misdemeanour, whether the prisoners or defendants or any of them shall be defended by counsel or not, each and every such prisoner or defendant, or his or their counsel respectively, shall be allowed, if he or they shall think fit, to open his or their case or cases respectively; and after the conclusion of such opening, or of all such openings, if more than one, such prisoner or prisoners, or defendant or defendants, or their counsel, shall be entitled to examine such witnesses as he or they may think fit; and, when all the evidence is concluded, to sum up the evidence respectively; and the right of reply and practice, and course of proceedings, save as hereby altered, shall be as at present (o).

Order of proceedings where prisoner sole witness.

But where the prisoner is himself the only witness to the facts, he gives his evidence immediately after the close of the case for the prosecution, and neither he nor his counsel, therefore, has any right to first open his case. After having given evidence, counsel for the prosecution sums up the case for the prosecution, being entitled in so doing to comment on

the prisoner's evidence, and prisoner or his counsel then addresses the jury, thus having the last word.

The order of procedure is the same where the prisoner, in addition to giving evidence himself as to the facts, calls witnesses merely to character.

But where any other witness to facts, besides the prisoner himself, is called for the defence, the prisoner or his counsel is entitled, as before the Act, to open his case before he and his witnesses go into the box.

The word "counsel" applies to solicitors in all cases where solicitors are allowed by law or by the practice of any court, to appear as advocates (g).

The prisoner or his counsel, as the case may be, at the close of the case for the prosecution, may submit to the bench any point of law arising on the evidence, or any deficiency in proof of a part of the charge, which may entitle his client to an acquittal. Thus, he may suggest that there is no evidence that any part of the offence occurred within the county where the trial is had, or within 500 yards of its boundary; that there is a substantial variance between some material allegation and the proof offered to support it; or that the offence, supposing the evidence to be credible, does not amount in law to that which is charged, *e.g.*, that an appropriation charged as a larceny is a mere breach of trust, or such an embezzlement as is only a misdemeanour (r), or that the goods alleged to be stolen were part of a freehold, and therefore not the subject of larceny (s); for these are matters which show that the prisoner ought not to be put on his defence. He may sometimes submit that there is nothing for the jury to consider, as when *no* evidence in the case has brought the charge near to his client; and, if the bench think so, they will direct an acquittal; but no question can be thus withdrawn from the jury where there is *any* evidence, however slight. Where an objection is taken which the bench do not immediately overrule, the counsel for the prisoner are first heard in its support; the counsel for the prosecution then give their answer to it *seriatim*; and the leading counsel for the prisoner replies; after which the justices deliberate, and the chairman, after collecting their votes, announces their decision. Where the objection relates to the absence of some formal proof, which can be immediately supplied, the court always allows such proof to be given, for it will not permit justice to be defeated by a mere accidental omission of counsel. When the bench has decided that the

Close of case
for prosecution.

(g) 28 Vict. c. 18, s. 9.

(r) For instance, such as comes within the statute relating to frauds by agents, bankers or factors, which are not triable at sessions (24 & 25 Vict. c. 96, s. 75, *et seq.*).

(s) 1 Hawk. c. 33, s. 35; 2 Russ. on Cr. 6th ed. 222.

Reserving
case for
opinion of
the Court of
Crown Cases
Reserved.

Counsel's or
prisoner's
opening
address.

case for the prosecution has failed in point of law, the accused is *entitled* to his acquittal. Accordingly the chairman ought not to *recommend*, but simply to *direct* the jury to acquit, and the officer ought immediately to take and record the verdict (*t*). If the bench decide that there is a case for the jury calling upon the prisoner for his defence, but that questions of law have been raised upon which they entertain doubts, they direct that the case shall proceed, but reserve the questions of law in the event of there being a conviction. With respect to cases referred for the consideration of the Court of Crown Cases Reserved, under the 11 & 12 Vict. c. 78, the procedure and practice on such case will be considered hereafter, Chap. VII., Sect. 2, p. 385.

Where there is evidence which ought to be submitted to the jury, the accused, or his counsel, in his opening address, if he is entitled to open his case, comments on the entire case for the prosecution. If he thinks it discreet to adduce evidence, he should open that evidence to any extent, and with any particulars which he may think proper; but he must not assume as proved that which is not proved (*u*), nor is he at liberty to introduce new matter, whether it be the prisoner's story or not, unless he proposes to establish it by legal evidence (*v*). It was formerly held, on the trial of misdemeanours, that an accused, who addressed the jury in person, must also examine and cross-examine without the assistance of counsel, though he might have it for suggesting questions to him, and arguing such points of law as arose (*x*); but no such division of the conduct of a case is now sanctioned. Where the party accused is obliged to defend himself, and does not go into the witness-box, any statement which he may make ought to be attentively heard; and though not made on oath, or supported by proof, still, if it offers a reasonable explanation of the circumstances which seem to bear against him, should be carefully weighed and candidly estimated by a jury.

Where several persons are jointly indicted either for felony or misdemeanour, and are defended by different counsel, they or their counsel, as the case may be, have to address the jury

(*t*) Lord Tenterden's course on acceding to an objection was merely to tell the jury: "Gentlemen, I am of opinion that, in point of law, the case has failed, and therefore you will say that the defendant is not guilty;" on which the officer immediately said: "Gentlemen, you will say the defendant is not guilty;" to which they assented, and the verdict was recorded. *Dick. Q. S. ed. Talf. p. 571, n. (b)*.

(*u*) *Post*, p. 341.

(*v*) If a case were necessary, *R. v. Beard* (1837), 8 C. & P. 142, might be mentioned.

(*x*) *R. v. Parkins* (1824), 1 C. & P. 548; *R. v. White* (1811), 3 Campb. 98; *R. v. Taylor* (1859), 1 F. & F. 535; *Shuttleworth v. Nicolson* (1833), 1 M. & Rob. 254.

in such order as the judge in his discretion shall permit (*z*); and the judge may call on counsel to address the jury, either in the order of their seniority (*a*) or in that in which the names of the prisoners stand on the indictment (*b*). Where two prisoners are indicted together, and one of them only is defended by counsel, it seems to be in the discretion of the judge whether he will allow the prisoner who is undefended to make his statement to the jury before or after the address of counsel (*c*), or the order in the indictment may be followed (*d*), and the latter would appear to be the general rule.

If several prisoners are all defended by counsel, and such counsel agree amongst themselves as to the order in which they shall address the jury, it is the practice for such agreement to be given effect to (*e*).

If after counsel for the defence of several prisoners have respectively addressed the jury for each prisoner one of them calls a witness in favour of the prisoner whom he defends, who gives evidence criminating another prisoner, the counsel for the latter prisoner has the right to cross-examine the witness, and to address the jury again with respect to that evidence (*f*). However, where the counsel for one has witnesses to *facts* to examine, the counsel for another cannot be allowed to postpone his address till after those witnesses have been examined (*g*), except by the express permission of the court.

It had become matter of complaint by persons charged with indictable offences, upon their trial, that they were unable by reason of poverty to call witnesses on their behalf, and that injustice was thereby occasioned to them; therefore, by 30 & 31 Vict. c. 35, s. 3, it is enacted that "in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed within this realm or upon the high seas, or upon land beyond the sea, and whether such person appear voluntarily upon summons, or has been apprehended with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused for trial, or admit him to bail, shall, immediately after obeying the directions of the eighteenth section of the

Attendance of prisoner's witnesses, how secured, and their depositions.

(*z*) *Fletcher v. Crosbie* (1842), 2 M. & Rob. 417, *per Rolfe, B.*, and *per Cresswell, J.*, Spring Assizes, York, 1852, MS.; Chit. Cr. Pl. 16th ed. p. 154.

(*a*) *R. v. Esdaile* (1858), 1 F. & F. 213.

(*b*) *R. v. Barber* (1844), 1 C. & K. 434.

(*c*) *R. v. Belton* (1859), 5 Jur. N. S. 276; *R. v. Holman* (1857), 3 Jur. N. S. 722.

(*d*) *R. v. Harris* (1857), 3 Jur. N. S. 272; *R. v. Meadows* (1856), 2 Jur. N. S. 718.

(*e*) *R. v. Barber*, *sup.*

(*f*) *R. v. Burdett* (1855), Dears. C. C. 431.

(*g*) *R. v. Barber*, *ubi sup.*

Act eleventh and twelfth Victoria, chapter forty-two, demand and require of the accused person whether he desires to call any witness; and if the accused person shall, in answer to such demand, call or desire to call any witness or witnesses, such justice or justices shall, in the presence of such accused person, take the statement on oath or affirmation, both examination and cross-examination, of those who shall be so called as witnesses by such accused person, and who shall know anything relating to the facts and circumstances of the case, or anything tending to prove the innocence of such accused person, and shall put the same in writing; and such depositions of such witnesses shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same, and transmitted in due course of law with the depositions, and such witnesses, not being witnesses merely to the character of the accused, as shall in the opinion of the justice or justices give evidence in any way material to the case, or tending to prove the innocence of the accused person, shall be bound by recognizance to appear and give evidence at the said trial; and afterwards, upon the trial of such accused person, all the laws now in force relating to the depositions of witnesses for the prosecution shall extend and be applicable to the depositions of witnesses hereby directed to be taken." By sect. 4, "all the provisions of the said Act eleventh and twelfth Victoria, chapter forty-two, relating to the summoning and enforcing the attendance and committal of witnesses, and binding them by recognizance and committal in default, and for giving the accused person copies of the examinations, and giving jurisdiction to certain persons to act alone, shall be read and shall have operation as part of this Act."

Evidence for
defence.

It is, of course, impossible to lay down general rules for the conduct of defences. They may consist of evidence tending to explain the circumstances on which a charge mainly rests; or of the evidence of witnesses present at a transaction tending to contradict directly the statement of the witnesses for the prosecution; or of evidence tending to show that the prisoner could not be guilty of the crime, because he was in another place at the period when it is said to have occurred, and which is popularly called an *alibi*; or of evidence calculated to show that the witnesses for the prosecution are unworthy of credit, by contradicting them upon points of their evidence relative to the transaction; or, lastly, of evidence tending to show the improbability of the prisoner's guilt, by proving that he has borne a character for qualities the reverse of those which would produce the criminality imputed.

Drunkenness.

Drunkenness affords in general no excuse for crime (*h*). Thus it is no defence to a charge of murder committed with a

deadly weapon (*i*). But where the crime charged against a prisoner is the doing of an act with any particular intent, his drunken state at the time of doing the act may be taken into consideration as going to negative the intent. Thus, where a prisoner was charged with shooting at the prosecutor with intent to murder him, it was left to the jury to say whether the prisoner's state of intoxication was such as to prevent him from forming any specific intention (*k*); and where the charge is attempted suicide, it may be a defence that the prisoner was "so drunk as not to know what he was about" (*l*). So, where in a case of assault it became material to see whether the prisoner apprehended an assault upon himself, the state of drunkenness in which he was should be considered (*m*).

Insanity. Insanity at the time of committing the act will be a defence, if it be clearly proved that the accused was then labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or as not to know that it was wrong (*n*). A medical man who has been present in court and heard the evidence may be asked as a matter of science whether the facts stated by the witnesses, supposing them true, show a state of mind incapable of distinguishing between right and wrong (*o*).

Infancy. When a child of any age between seven and fourteen is indicted, it should be left to the jury to say, first, whether the offence was committed by the prisoner, and if it was, then whether at the time it was so committed the child knew that it was wrong; and the legal presumption being that a child of that age has not such (*viz.* guilty) knowledge, it is for the prosecutor to rebut it by evidence (*p*); but in particular cir-

(*i*) *R. v. Carroll* (1835), 7 C. & P. 145; *R. v. Meakin* (1836), 7 C. & P. 297.

(*k*) *R. v. Monkhouse* (1849), 4 Cox, 55.

(*l*) *R. v. Moore* (1852), 3 C. & K. 319.

(*m*) *R. v. Gamlen* (1858), 1 F. & F. 90.

(*n*) *R. v. M'Naghten* (1843), 10 Cl. & Fin. 200.

(*o*) *Ibid.* In *R. v. Higginson* (1843), C. & K. 129, Maule, J. (who had differed from the other judges in *R. v. M'Naghten*), asked the jury, whether the prisoner at the time of committing the offence was so insane as not to know right from wrong?

(*p*) *R. v. Owen* (1830), 4 C. & P. 236; see 1 Hawk. ch. 1, s. 8. In *York's case* (1748), Foster, 70, a little girl of five years old, supported in a parish workhouse, was murdered by blows, and her body found concealed in a dunghill. A boy of ten years old, who inhabited the same house, confessed several times that he had deliberately murdered her; giving a methodical and consistent detail of a multitude of circumstances, showing what Lord Hale calls (1 Hale, 630) a "mischievous discretion" in himself. He was found guilty, but sentence was respited for the opinion of the judges. They all thought that to spare this criminal merely on account of his age would be of very dangerous consequence, considering the many serious offences, as arson, &c., of which children are capable. However, many reprieves were granted to afford time to investigate the origin of the matter more closely, but no light being cast on it, it was resolved to grant no more of them; when, after nine years, a pardon was granted at the Summer Assizes, 1757, on condition of the prisoner immediately entering the sea service.

cumstances conclusive presumptions are made by the law with respect to infants. Thus an infant under the age of seven years is conclusively presumed to be incapable of committing any felony for want of discretion (*q*), and under fourteen a male infant is conclusively presumed incapable on the ground of impotency of committing a rape as a principal in the first degree (*r*); and the presumption applies to the offence of carnally knowing a girl under sixteen years of age (*s*); and, therefore, evidence is not admissible to show that in fact he has attained the full state of puberty, and was in fact capable of committing the crime. So that he is also presumed incapable of committing an assault with intent to perpetrate that crime (*t*), and equally so of attempting to commit the crime (*u*); but an adult patient, in an unnatural offence, may be convicted though the agent was a boy under fourteen (*x*). Where two boys of eight years of age submitted through ignorance of the moral nature of the acts to indecent acts on the part of a grown-up man, they were not deemed to consent to the acts, and the adult was held rightly convicted of indecent assault (*y*).

Coercion of
husband.

The general rule governing the defence of coverture is that a wife cannot be convicted of a bare theft or even of a burglary committed in the company of her husband; such act of hers being presumed to be done under his coercion, and therefore punishable in his person only. But this is in all cases merely a presumption, open like all others to be rebutted by evidence to the contrary; for if the husband is crippled or bed-ridden, or if she is the principal actor in and incitor to the felony, she seems punishable as well as the husband (*z*). And it is quite clear that if in his presence she commits treason, homicide, robbery, or, as it would seem, any felony accompanied with violence she will be liable to be convicted; or if in his absence she steals, or takes an active and inde-

(*q*) 1 Hale, 27; Taylor on Ev. 9th ed. § 104.

(*r*) *R. v. Groombridge* (1836), 7 C. & P. 582.

(*s*) *R. v. Phillips* (1839), 8 C. & P. 736; *R. v. Jordan* (1839), 9 C. & P. 118.

(*t*) *R. v. Eldershaw* (1828), 3 C. & P. 396.

(*u*) See, as to attempts to commit offences, *R. v. McPherson* (1857), 26 L.J.M.C. 134; *R. v. Collins* (1864), 33 L.J.M.C. 177. The latter case has been overruled by *R. v. Brown* (1896), 24 Q.B.D. 357; but the question is still an open one whether a boy whom by reason of his age the law presumes incapable of committing the offence of rape, can be convicted of the attempt. In *R. v. Williams*, [1893] 1 Q.B. 320, the point was not before the court for decision, but in delivering judgment Coleridge, C.J., expressed himself as of opinion that no conviction for the attempt was possible, while Hawkins, J., differed from Coleridge, C.J., and Cave, J., and Day, J., desired further discussion of the question before deciding it. The facts of the various cases are given and the matter is discussed at length in Appendix D., *post*.

(*x*) *R. v. Allen* (1849), 18 L.J.M.C. 72.

(*y*) *R. v. Lock* (1872), L.R. 2 C.C.R. 10.

(*z*) See *R. v. Archer* (1826), 1 Moo.C.C. 143, cited in *R. v. Cruse* (1838), 2 *id.* 53; *R. v. Pollard* (1838), 1 Russ. Cr. 6th ed. p. 154, relied on in *R. v. Cruse*, *sup.*

pendent part in receiving stolen goods, or in receiving a person whom she knows to have committed felony; or utters a forged order for the payment of money; or aids or abets her husband in assaulting another, and causing a bodily injury dangerous to life, she will be liable as if she were *sole*, though her offence may have been planned or commanded by her absent husband (*a*). For offences of this nature committed by a wife in the absence of her husband they may be indicted together, charging the wife as principal and the husband as accessory (*a*); but if stolen goods are found in the house of a man not being the thief, that is *prima facie* evidence against him alone though his wife live with him. And upon a joint indictment for receiving against the husband and his wife, who is found in the house with the goods, and gives a false account of them in the absence of her husband, but against whom there is no evidence of any independent act at the time of the original receipt, he may be convicted, but she must be acquitted (*c*), and a married woman cannot be convicted of receiving stolen goods who has received them from the hand of her husband (*d*). Therefore, where the facts admit of such a construction, the jury should in such a case be asked whether the wife received them from her husband or in his absence from some other person (*e*).

A distinction has been laid down that a wife is punishable for any offence *short* of felony committed by her, whether alone or in company with her husband (*f*); but if the wife were to receive goods not stolen, but obtained by means of a misdemeanour under the Larceny Act, 1861, under such circumstances as would have excused her if they had been stolen, can it be doubted that she would be equally entitled to be excused, if indicted under sect. 95 of that Act? And the

(*a*) See 1 Hawk. c. 1, ss. 2, 9; 1 Hale, 45, 47, 516, 621; 2 East, P. C. 552; *R. v. Morris* (1814), R. & Ry. C. C. 270; *R. v. Archer* (1826), 1 Moo. C. C. 143; *R. v. Dicks* (1781), 1 Russ. on Crimes, 6th ed. 147; *R. v. Manning* (1849), 2 C. & K. 903. As to wife's aiding and abetting her husband's felonious assault on another, see *R. v. Cruse* (1838), 2 Moo. C. C. 53; *R. v. Smith* (1858), 27 L. J. M. C. 204, where upon a joint indictment for feloniously wounding with intent to disfigure, the jury found that the wife acted under the coercion of her husband, and did not personally inflict any violence, the wife was held to be entitled to be acquitted.

(*c*) *R. v. Matthews* (1850), 2 Den. C. C. 596.

(*d*) *R. v. Brooks* (1853), 1 Dears. C. C. 184.

(*e*) *R. v. Wardroper* (1860), 29 L. J. M. C. 116.

(*f*) *R. v. Williams* (1711), 10 Mod. 63, *e.g.*, keeping a disorderly house, for which she may be indicted alone, if her husband does not live with her: 1 Bac. Ab. 294, or jointly with him if he does: 1 Hawk. c. 1, s. 12. So she is indictable jointly with him for keeping a gaming-house: *R. v. Dickson* (1715), 10 Mod. 335; and for conspiring with another as well as her husband; and for forcible entry, &c.; and alone for riot, assault, &c. See 1 Hawk. c. 1, ss. 10—14. *R. v. Williams* and *R. v. Dickson* (*sup.*) were decided rather upon the active share which the wife was presumed to have taken in the management of the house than upon the charge being a misdemeanour.

suggested distinction has been disregarded in a case where husband and wife were jointly indicted for uttering base coin, the uttering being by the wife in her husband's presence (*g*). Again, a wife, being looked upon as the servant of the husband, is not indictable for breach of duty in not providing his apprentice with sufficient food and necessaries, whereby he died, unless she wilfully withheld them when furnished to her for his use by her husband (*h*).

A wife cannot be indicted for conspiring with her husband alone, or as accessory after the fact for receiving him after knowing him to have committed felony, or for receiving jointly with her husband a third person known to be in a like circumstance (*i*). On the other hand, a husband is indictable as accessory after the fact for receiving his wife, knowing her to have been guilty of felony (*k*).

Larceny by
wife and
adulterer.

The possession of the wife being in point of law identical with that of the husband, she cannot be guilty of stealing any article belonging to him; nor could she before 31 & 32 Vict. c. 116, have been convicted for stealing articles which belonged to him and others, except in those cases where he himself could have been so convicted (*l*), as, for instance, where the property so stolen was in the actual possession of a third person, who by any rule of a society of which he was a member, or by compulsion of law, would, in case of its loss, have been chargeable for it as bailee (*m*). So a stranger is not guilty of larceny who merely assists the wife to take and carry away her husband's goods, apart from any question of adultery (*n*); but it is said, that if the stranger acted as principal in the taking, and the wife merely assented, the stranger would be guilty of larceny if he acted with a felonious intention (*n*). Though a wife may thus with impunity part with her husband's property to another, yet if, as in a common case in the humbler walks of life, in contemplation of adultery, the adulterer take part with the wife in abstracting the goods in order to go and live in adultery, it is larceny in him (*p*); but the wife's necessary wearing apparel may even

(*g*) *R. v. Price* (1837), 8 C. & P. 19, by Mirehouse, C. S., after consulting Bosanquet and Coltman, JJ.

(*h*) *R. v. Squire* (1799), 1 Russ. on Crimes, 6th ed. 151.

(*i*) 1 Hawk. c. 27, s. 8; 1 Hale, 47, 621.

(*k*) 1 Hawk. c. 1, s. 10.

(*l*) 1 Hale, 513; 1 Hawk. c. 33, s. 19; *R. v. Willis* (1833), 1 Moo. C. C. 375.

(*m*) *R. v. Bramley* (1822), R. & Ry. 478. See *R. v. March* (1828), 1 Moo. C. C. 182, when a wife was held not liable to be convicted of the arson of a husband's house.

(*n*) *R. v. Avery* (1859), 28 L. J. M. C. 185. See also *R. v. Berry* (1859), 28 L. J. M. C. 70.

(*p*) *R. v. Thompson* (1850), 2 Den. C. C. 549; *R. v. Mutters* (1865), 34 L. J. M. C. 54; *R. v. Featherstone* (1854), 23 L. J. M. C. 127; *R. v. Tolfree* (1829), 1 Moo. C. C. 243; *R. v. Tollett* (1841), C. & M. 112.

under such circumstances be taken away by her, and it is no larceny for the adulterer to assist her in so doing (*q*). The principle is, that in the eye of the law the husband and wife are one person; but when she becomes an adulteress she thereby determines her quality of wife, and her property in her husband's goods ceases (*r*). But if she abstract her husband's goods and with them join an adulterer for the purpose of living in adultery, and he takes personal possession of them, it is larceny in her, and the adulterer may be convicted of receiving the goods knowing them to have been stolen (*s*); it is, however, not enough merely to show that they were brought by the wife to the place where they are found together, unless circumstances appear to show that he had possession of them (*t*).

A woman who sets up her coverture in her defence must prove it (*u*), unless her character as such is admitted by her description in the indictment, *e.g.* "wife of" A. B. (*x*); and though strict evidence of a marriage need not perhaps be given, the jury must be satisfied of it on the evidence given. Cohabitation and reputation of a marriage have been considered sufficient evidence of it for this purpose (*y*), though mere cohabitation and passing by a man's name are not (*z*).

Proof of
coverture.

Where it is proposed to discredit a witness called on the other side, by showing that, on another occasion, he has given a different account of a transaction, he must be first cross-examined as to such account, and the subject brought distinctly to his memory, by specifying the circumstances of time and place, and of the person, if any, involved in the contradiction to be afterwards given (*a*). When this has been first done, evidence of his declarations, or acts inconsistent with his testimony, on matters relevant to the issue, and which he has denied on cross-examination, may be admitted (*b*). And such declaration can be received to contradict him, where he does not distinctly admit that he ever made it, and when a witness has been cross-examined in accordance with the 28 Vict. c. 18, s. 5 (*ante*, p. 321), as to previous statements made by him and put into writing, he may be contradicted by parts of the writing. If he has been asked whether he has

Discrediting
witness called
for the prose-
cution.

(*q*) *R. v. Fitch* (1857), 26 L. J. M. C. 169.

(*r*) *R. v. Featherstone* (1854), 23 L. J. M. C. 127.

(*s*) *R. v. Deer* (1862), 32 L. J. M. C. 33.

(*t*) *R. v. Rosenberg* (1843), 1 C. & K. 233.

(*u*) *R. v. Jones* (n. d.), Russ. on Cr. 6th ed. 159.

(*x*) 1 Hale, 46; *R. v. Knight* (1823), 1 C. & P. 116.

(*y*) *R. v. Atkinson* (1814), Russ. on Cr. 6th ed. 159.

(*z*) *R. v. Hassall and another* (1826), 2 C. & P. 434.

(*a*) 28 Vict. c. 18, s. 4, *ante*, p. 320.

(*b*) *De Sailly v. Morgan* (1799), 2 Esp. N. P. C. 691; but if the particular question which should have been put to the plaintiff's witness for the defendant has not been put, the court has a discretion to suffer him to be recalled before the defendant's proceeding to contradict him: *Angus v. Smith* (1829), M. & M. 474.

committed a crime, or any other matter intended to affect his general credit, and denies the imputation, evidence cannot be received to show that his denial is false; or else the time of the court might be occupied in the trial of a number of collateral circumstances on which neither the witness nor those who call him can be supposed ready to enter (*c*); though now he may be questioned as to whether he has been convicted of any felony or misdemeanour; and if it is not admitted, the cross-examining party may prove the previous conviction by a certificate (*d*). With the above exception, it is not allowable to adduce evidence to prove that the witness is unworthy of credit because he has been guilty of a crime, or a number of crimes, as to which he has not been examined. The reverse was strenuously contended for in a case of high treason, in reference to the principal witness for the crown; and the judges then, without requiring the attorney-general to reply, rejected the evidence as clearly inadmissible (*e*). Thus, upon a charge of indecent assault, or rape, or attempt to commit rape, upon questions put to the prosecutrix as to particular acts of connexion with other men than the prisoner her answers are final, and the men named to her cannot be called to contradict her (*f*). Thus, where a witness, on the trial of his master for felony, was asked whether he had not been charged with robbing the prisoner, and also whether he had not threatened to be revenged of him, and to fix him in gaol, but denied both; on the offer of evidence in contradiction, it was holden that the witness's answer as to the charge of robbery against him was conclusive, but that on the latter, as the words might have reference to his testimony on the pending indictment, evidence might be received to show that the words were spoken by the witness (*g*). The only general evidence to discredit a witness which is allowed in any case (except the production of a record of conviction) is that of witnesses who state that they would not believe him on his oath (*h*). This is the simple answer which such witnesses can be allowed to give on examination in chief, but they may be cross-examined as to the grounds of their opinion, and, unless they can give some very satisfactory reasons, little weight will be attached to such a statement. It is obvious that such an assertion is as difficult to support as it is easy to make. Its admission seems inconsistent with the principle, that irrelevant facts shall not be allowed to heap infamy on a witness, since

(*c*) *R. v. Watson* (1817), 2 Stark. N. P. C. 150; *R. v. Clarke* (1817), *ibid.* 244; *Harris v. Tippet* (1811), 2 Camp. 637.

(*d*) 28 Vict. c. 18, s. 6; see the section in full, *ante*, p. 321.

(*e*) *R. v. Watson*, *sup.*

(*f*) *R. v. Holmes* (1871), L. R. 1 C. C. R. 334; *R. v. Hodgson* (1812), R. & Ry. 211; *R. v. Cockcroft* (1870), 11 Cox, C. C. 410.

(*g*) *R. v. Yewin* (1811), 2 Camp. 638.

(*h*) *R. v. Brown* (1867), L. R. 1 C. C. R. 70.

such testimony can only be supported as the result of facts known to the party who makes it; and, in practice, judges are in the habit of directing juries that it is worthy of very little attention.

A party indicted (*i*) is always permitted to call witnesses, who have been more or less acquainted with him, to bear testimony to the character he has maintained in respect of the qualities which are inconsistent with the imputed offence: as to his character for honesty, on a charge of stealing; to his humanity, on a charge of violent assault; to his loyalty, on a charge of sedition or libel. These witnesses will be permitted to speak to general character only, and not to particular actions; but they may be allowed to state their peculiar means of knowledge, as, that the prisoner was in their employ and trusted by them; and the jury may draw the inference of the value of character derived from such sources.

Evidence to character of prisoner.

It is not usual to cross-examine witnesses to character unless the counsel cross-examining has some distinct charge on which to cross-examine them (*k*).

As to the *effect of character*, and the manner in which it should be left to the consideration of the jury, it may be observed that it is rather difficult to understand the general practice of some learned judges on the subject. On this point, the following observations of a criminal lawyer of great experience and learning (*l*) are well worthy of the attention of justices who may preside in sessions:—"It has been usual to treat the good character of the party accused as evidence to be taken into consideration only in doubtful cases. Juries have generally been told, that where the facts proved are such as to satisfy their minds of the guilt of the party, character, however excellent, is no subject for their consideration; but when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is, however, submitted with deference that the good character of the party accused, when satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge, and the evidence by which it is supported, will often render such ingredient of little or no avail; but the more correct course seems to be, not, in any case, to withdraw it from consideration, but to leave the jury to form their conclusion upon the evidence, whether an individual whose character was previously un-

Effect of character.

(i) This rule does not apply to informations for penalties or to civil proceedings: *Huntley v. Luscomb* (1801), 2 B. & P. 532.

(k) *R. v. Hodgkiss* (1836), 7 C. & P. 298.

(l) Mr. Serjeant Russell, late chief justice of Bengal, in his work on Crimes and Misdemeanours, vol. 3, 6th ed. 427.

blemished has or has not committed the particular crime for which he is called on to answer."

To these remarks we may be permitted to add that, according to the language frequently adopted by judges in their charges, it may be proved that character is, *in no case*, of any value. They say that, "In a clear case character has no weight; but if the case be doubtful—if the scale hangs even—then the jury ought to throw the weight of character into the scale, and allow it to turn the balance in the prisoner's favour." But the same judges will tell juries "that, in every doubtful case, they ought to acquit," stopping far short of the even balance, and "that the prisoner is entitled to the benefit of any reasonable doubt." In clear cases, therefore, the character is of no avail, and in doubtful cases it is not wanted; it is never to be considered by the jury but when the jury would acquit without it! The sophism lies in the absolute division of cases into *clear* and *doubtful*, without considering character as an ingredient which may render that doubtful which would otherwise be clear; there may certainly be cases so made out that no character can make them doubtful; but there may be others in which evidence given against a person without character would amount to conviction, in which a high character will *produce a reasonable doubt*, nay, in which character will actually outweigh evidence which might otherwise appear conclusive^(m). It is in truth a fact varying greatly in its intrinsic value, according to its nature; varying still more in its relative value, according to the proofs to which it is opposed; but always a *fact*, fit, like all other facts proved in the cause, to be weighed and estimated by the jury⁽ⁿ⁾. And Cockburn, C. J., in *R. v. Rowton* (o), says: "It has been put that evidence in favour of the character of a person on his trial raises a collateral issue. I can hardly think that it is a collateral issue in the proper sense of the term. It becomes one of the points on which the jury are to found their verdict."

Evidence in reply; and herein of proving the previous conviction of the prisoner for felony.

When the evidence for the party accused has been closed, the prosecutor's counsel may offer any evidence in reply which is strictly applicable to the defence, and which could form no part of his original case. Thus he may give specific contradictions to denials by the defendant's witnesses on cross-examination^(p); he may call persons to swear that they would not believe the witnesses on their oaths; if a prisoner on his trial gives evidence that his character is good, it is open to the prosecution, by way of reply, to prove that the prisoner's character is bad^(q); but a witness called for

(m) Dick. Q. S. ed. Talf. p. 578.

(n) *Ibid.*

(o) *R. v. Rowton* (1865), 34 L. J. M. C. 60.

(p) See *ante*, p. 320.

(q) *R. v. Rowton*, *sup.*

the prosecution, to rebut evidence of good character for decency and morals, given on behalf of a prisoner on a charge of indecent assault, was not permitted to give evidence of his own opinion and that of his brothers on the subject formed from his and their knowledge of him when at school (r). So he may supply an answer to any matter of excuse which the prisoner has set up, and which he could not anticipate; but he must not address the jury in introducing such evidence, nor make a new case, nor seek to fill up the chasms or supply the deficiencies of that on which he originally relied.

If a prisoner charged upon indictment with an offence punishable under the 24 & 25 Vict. c. 96 (the Larceny Act, 1861), and committed after a previous conviction or convictions for any felony, misdemeanour, or offence or offences punishable upon summary conviction, upon the trial for any such offence shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such prisoner for the previous offence or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence (sect. 116). As to the mode of proving the conviction, see same section, and see *ante*, p. 290. And under the Coinage Act (24 & 25 Vict. c. 99), where any person shall have been convicted of any offence *against that Act or any former Act relating to the coin*, and shall afterwards be indicted for any offence *against that Act* committed subsequently to such conviction, if, upon the trial of any person for any such subsequent offence, such person shall give evidence of his good character, it shall be lawful for the prosecutor in answer thereto to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence (sect. 37). As to mode of proof of conviction by a certificate, see *ante*, p. 290.

Previous conviction of prisoner may be proved in reply to rebut evidence to character.

A person is deemed to have given evidence of his good character within the meaning of the above sections, whether he has done so personally in the witness box, or by calling witnesses, or by eliciting favourable testimony in cross-examining the witnesses for the prosecution (s).

After the evidence for the defence is concluded, the prisoner or his counsel has the right to sum up under 28 Vict. c. 18, s. 2; but if the only person called for the defence (other than witnesses to character only) is the prisoner himself, the evidence

Defendant's right to sum up his evidence for the defence.

(r) *R. v. Rowton* (1865), 34 L. J. M. C. 57.

(s) *R. v. Shrimpton* (1851), 21 L. J. M. C. 37; *R. v. Gadbury* (1838), 8 C. & P. 676, *per* Littledale, J., and Parke, B.

for the defence is followed by the speech of counsel for the prosecution, and prisoner's counsel has the last word to the jury under the Criminal Evidence Act, 1898 (*ante*, p. 326).

When the defence is ended, the counsel for the prosecution, in every case in which the accused has called and examined any witnesses or has caused any evidence to be given, or a witness's deposition has been read on cross-examination, has a right to reply on the entire case, and on all the observations made by the other side during its progress. But this is subject to the right of counsel for the prisoner to have the last word to the jury where the only witness called for the defence is the prisoner himself.

The like right exists, in strictness of law, if the witnesses for the defence speak merely to the character of the accused (*t*). If two are indicted jointly for the same offence, and one calls witnesses, the counsel for the prosecution is entitled to a general reply (*u*). But if the offences are separate, and might have been separately indicted, the reply must be confined to the case of the party who called witnesses: though departing from this course is no ground for arresting the judgment (*x*). Before the Criminal Evidence Act, 1898, came into operation, it was not the practice to reply in cases of a statement by a defendant in person, unsupported in evidence; and a usage of forbearing to reply where the defendant's witnesses were only to character has been long acted on. The Act gives no reply where the prisoner is the only witness for the defence. It is submitted that where the prisoner, instead of going into the box and subjecting himself to cross-examination, makes a statement of facts from the dock, the right of reply, in strictness, remains as it was before the Act passed; although, no doubt, it would not be proper for counsel, in his discretion, to exercise such right except under very special circumstances. By the Fourth Regulation of the Judges in 1837, respecting the trial of felonies, "if the only evidence called on the part of the prisoner is evidence to character, although the counsel for the prosecution is entitled to reply, it will be a matter for his discretion whether he will use it or not. Cases may occur in which it may be fit and proper so to do." The cases here alluded to are only those singular instances where it is necessary to contradict the witness to character, either by cross-examination or otherwise, so as to expose any improper scheme for supporting the defence.

In one case there seems little question as to the propriety

(*t*) *R. v. Whiting* (1837), 7 C. & P. 771; *R. v. Stannard* (1837), *id.* 673. See Fourth Regulation of Practice of the Judges issued before Spring Circuit, 1837, as to trials of felonies, *supra*.

(*u*) *R. v. Briggs* (1854), 1 F. & F. 106; *R. v. Blackburn* (1853), 3 C. & K. 330; *R. v. Jordan* (1839), 9 C. & P. 118.

(*x*) *R. v. Hayes and others* (1838), 2 M. & Rob. 155; *R. v. Burton* (1861), 2 F. & F. 788.

of a reply from the prosecutor's counsel, though the only witnesses called for the accused should be to character, viz., where the indictment charges a previous conviction for felony; so that, unless the evidence to character is restricted to a period after the former conviction, it appears a fair case for a reply on the whole facts.

In cases of public prosecutions for felony instituted by the crown itself (and, as it would seem, in misdemeanours), as, for instance, in Mint or Post Office prosecutions, the law officers of the crown, and those who represent them, are in strictness entitled to reply, although no evidence is produced on the part of the prisoner (*y*): and this as well on collateral (*z*) as original issues; but this right of reply has been objected to by some judges (*a*).

An important rule, which was promulgated by Lord Kenyon, was revived by Lord Tenterden, by which a reply is allowed to a counsel for the prosecution, if the counsel for the defendant, in his address to the jury, opens any fact or document not already in evidence, but afterwards declines to call a witness, or put in the writing (*b*). But the rule does not

(*y*) Fifth Regulation of Practice of twelve Judges, &c.; also *R. v. Marsden* (1829), M. & M. 439; *R. v. Bell* (1829), *id.* 440, Lord Tenterden; *R. v. Gardner* (1845), 1 C. & K. 628; *R. v. Toakley* (1866), 10 Cox, C. C. 406.

(*z*) *E. g.*, issues of identity: *R. v. Rodcliff* (1746), 1 W. Bla. 6.

(*a*) By Martin, B., in *R. v. Christie* (1858), 7 Cox, C. C. 506; by Byles, J., in *R. v. Taylor* (1859), 1 F. & F. 535; and in *R. v. Beckwith* (1858), 7 Cox, C. C. 505; and by Brett, J., in *R. v. McCubrey* (1868), Sess. Papers C. C. 1868—1869, p. 540. All the authorities will be found collected in Vol. 2, State Trials N. S. 1019.

(*b*) *R. v. Bignold* (1824), 1 D. & R. N. P. C. 59. Indictment for misdemeanour (perjury), tried at *nisi prius*, at Westminster, after Hilary Term, 1823. The then solicitor-general was counsel for the defendant, and stated the contents of a paper not referred to by the counsel for the prosecution, or forming a part of his case; but afterwards, on communicating with his client, sat down, saying he should call no witnesses. The counsel for the prosecution claimed a right to reply, mentioning a case in which Lord Kenyon had allowed it to Erskine in a similar situation. Abbott, L. C. J., assented to the principle as undoubted, and the counsel replied shortly, stating that he did so in assertion of the right. Defendant was convicted, but judgment was afterwards arrested for matter on the record. (The above statement has been collated with Mr. Jardine's MS. notes.) Dick. Q. S. 5th ed. 58 (n.).

This right of reply was considered a settled rule. However, in *Creyer v. Sodo et al.* in 1827, M. & M. 86, Lord Tenterden said: "If the defendant's counsel refuses to call a witness to establish the facts which they have undertaken to establish, the judge may, in his discretion, permit a reply; but as to the strict right, the practice is clearly against it." (*R. v. Bignold* had not been cited.)

In *Faith v. McIntyre* (1835), 7 C. & P. 44, the defendant began, and one of his witnesses, when cross-examined, proved the handwriting of a letter, which the plaintiff's counsel afterwards read to the jury in the course of his address, without putting it in as his evidence. The defendant's counsel claimed to reply. As the jury had been put in possession of the contents of the letter, Parke, B., said that he had often

extend further, so as to give the prosecutor's counsel a right to reply, where cases and authorities only are cited for the defence (*x*). However, it has been held in a civil case, that if the counsel for a defendant, in his address to the jury, cites a case, but calls no witness, the plaintiff's counsel has a right to observe on the case so cited (*y*), and there would seem to be no reason for making any distinction between civil and criminal proceedings in this respect.

Summing up
by chairman.

When the case on both sides is closed, the chairman sums up the evidence. He states the substance of the charge, divesting it of all technical phraseology which may encumber it, directs the attention of the jury to the precise issue they have to try, and applies the evidence to that issue. Having taken accurate notes of the evidence, he will either read over the whole evidence, or state its substance, as the case may seem to his judgment to require. He will always read the whole if requested by the jury; though in many cases this will be found unnecessary, and will rather tend to confuse than to assist them.

Discharge of
jury from
giving a ver-
dict.

The doctrine formerly current, that the prisoner has a right after the trial has begun, and he has been given in charge to the jury, to demand that the trial should be continued till a verdict should be given, or if that cannot be done, that he should be acquitted and discharged, cannot be maintained (*z*). A jury sworn and charged with a prisoner may be discharged without giving a verdict by the presiding judge if a "necessity"—that is, a high degree of need—for such discharge is made evident to the mind of the judge. He alone is to decide when the "necessity" for such discharge is made evident to his mind, and his decision is not subject to review by any legal tribunal. The statement upon the record of such decision is sufficient to establish the lawfulness of the discharge, and such discharge, even if it be an improper exercise of discretion on the part of the judge, is not a legal bar to a subsequent trial of the prisoner for the same offence, either

heard a reply threatened if a counsel or a party opened new facts, but had never heard one actually made on a mere opening. He suggested, that in good faith the letter should be put in, which was done, and the reply followed of course. (No case was cited on either side.)

The right of reply in the text was recognised in *R. v. Carlisle* (1834), 6 C. & P. 636; and see *Stevens v. Webb* (1835), 7 C. & P. 60.

In *R. v. Butcher* (1839), 2 M. & Rob. 228, Coleridge, J., held, in a case of felony, that a statement by counsel of facts which they cannot or do not intend to prove, gives a reply to the prosecutor, adding, "the same rule ought to prevail as in civil cases." It is irregular and improper in counsel to state to a jury, as facts, any matter which cannot be proved before them. See *Stevens v. Webb*, *sup.*

(*x*) *Power v. Barham* (1835), 7 C. & P. 356, Coleridge, J.

(*y*) *Ibid.*

(*z*) *Wansor v. The Queen* (1866), 35 L. J. M. C. 161; *R. v. Charlesworth* (1861), 31 L. J. M. C. 25.

upon the same or upon a fresh indictment. In the leading case the failure of the jury to agree, after several hours' consideration, at twelve o'clock on a Saturday night, was held to constitute such a high degree of necessity as to justify the discharge of the jury (*a*); and so, doubtless, would the improper disclosure to the jury of a previous conviction against a prisoner.

SECTION 12.

DISCHARGE OF THE JURY—OF THE SEPARATION OF THE JURY—
OF THE DELIBERATION AND VERDICT OF THE JURY—
RECORDING THE VERDICT—EFFECT OF THE VERDICT—
DEFECTS CURED BY VERDICT.

If a material witness for the prosecution be absent, or refuse to be sworn or to give evidence, and such absence or refusal be brought about in collusion with or at the instigation of the accused, in order to prevent a failure of justice, the court should discharge the jury and postpone the trial (*b*); but whether, if no such collusion or instigation could be shown, it would be a proper exercise of the judge's discretion to discharge the jury is doubtful (*c*).

Absence of
witness
through
collusion.

Where, after the jury have been charged, a prisoner indicted for felony becomes, from sudden illness, incapable of remaining at the bar during the trial, the jury should be discharged. If he recovers during the session, he may be retried, the whole of the proceedings in his trial being commenced *de novo* (*d*); if not, the recognizances must be respited till the next session. A trial for either felony or misdemeanour may be postponed, and a jury discharged, on the request of the prisoner's counsel, on account of the absence of a material witness, *e.g.*, the surgeon, who examined the body, or for other sufficient cause (*e*).

If a jurymen dies during the trial, or is taken so ill as to be unable to attend to the evidence or agree in the verdict, juror.

Illness of
juror.

(*a*) *Winsor v. The Queen* (1866), 35 L. J. M. C. 161; *R. v. Charlesworth* (1861), 31 L. J. M. C. 25.

(*b*) *R. v. Charlesworth, ubi sup.*

(*c*) *Ibid.*

(*d*) *R. v. Stevenson* (1791), 2 Lea. C. C. 546; *R. v. Streeck* (1826), 2 C. & P. 413.

(*e*) *R. v. Stokes* (1833), 6 C. & P. 151; *R. v. Fitzgerald* (1843), 1 C. & K. 201; *Wedderburn's case* (1746), Fost. Cr. Law, Oxon. ed. 1762, p. 22, where it is said that the application, if made by the prisoner, must be made before any evidence has been given.

the survivors must be discharged, and the prisoner tried afresh. A sick juror may be attended by another juror, or a surgeon, accompanied by a bailiff, sworn to remain constantly with him. The juror or surgeon, on his return, may be questioned on oath, to make true answer to such questions as the court shall demand of him respecting the state of the absent juror. If it appear that he will in all probability speedily recover, he may have refreshment; but if not, or if he dies, the eleven jurors must be discharged from giving any verdict. Their names should then be called over again *instantly*, and another person on the panel of jurors called into the box. The prisoner must then be offered his challenges to all twelve, after which each of them, or of those substituted for them on challenge, must be sworn *de novo*, and be charged with the prisoner. The trial must then begin again (*f*). Where the eleven were all resworn without challenge, the evidence which had been given was read by consent, from the judge's notes, before them and the twelfth juror; and each witness was asked whether it was true (*g*). A jury will not be discharged because it is discovered during the trial that one of them is related to the prisoner (*h*). Under the old law, if after the jury is charged it appears that the prosecutor's principal witness is incapable of being examined, he having no idea of a future state of reward and punishment, the jury should not be discharged in order to give an opportunity to instruct the witness, but the prisoner ought to be acquitted (*i*).

Withdrawing
a juror.

In misdemeanours a juror may be withdrawn by consent of the prosecutor and defendant, though not without it (*k*). By this course one of the jurors being allowed nominally to withdraw, the rest are discharged from giving any verdict. This course is sometimes suggested by the court in cases of a personal kind, as assaults, with a view to a reconciliation between the parties, or that neither may have a triumph.

Of the delibera-
tion of the
jury on their
verdict.

When the charge is concluded, the jury proceed to consider their verdict. If, on consultation in the box, they are not able to agree in a convenient time, they retire, and a bailiff is sworn to keep them in the following terms:—

“You shall keep this jury without meat, drink, fire, or candle, except by leave of the court; you shall suffer none to speak to them, neither shall you speak to them yourself, but only to ask them if they are agreed.—So help you God.”

(*f*) See by eleven judges in *R. v. Edwards* (1812), 3 Campb. 207. See *R. v. Scalbert* (1794), Lea. 620; *R. v. Beere* (1843), 2 M. & Rob. 472, Cresswell, J.

(*g*) See *R. v. Edwards* (1812), *ubi sup.*

(*h*) *R. v. Wardle* (1842), C. & M. 647.

(*i*) *R. v. Charlesworth*, *ubi sup.*; *R. v. Wade* (1825), 1 Mood. C. C. 86. See *R. v. White* (1786), 1 Lea. 430. But see *ante*, p. 305, where this question is discussed in relation to the Oaths Act, 1888.

(*k*) *R. v. Perkins* (1698), Carth. 465; *Kinloch's case* (1746), Fost. Cr. Law, 28.

Now by the Juries Act, 1870 (33 & 34 Vict. c. 77), s. 23, jurors after having been sworn may, in the discretion of the judge, be allowed at any time before giving their verdict the use of a fire when out of court, and be allowed reasonable refreshment to be procured at their own expense. And the restriction as to candle has been always dispensed with on the retirement of a jury at night, when they require the inspection of documents which have been given in evidence. If the jury eat without permission, after they leave the box, they are fineable (*l*), but their breach of the rule in this respect will not avoid their verdict. Whether the jury shall be permitted to separate before giving their verdict is in all cases a question for the court; but in a long trial for misdemeanour, lasting more than the day, their dispersion to their several homes during an adjournment, though without leave or consent of the court, or knowledge of the parties, does not avoid their subsequent verdict, if there is no suggestion of their having been practised on in the interim (*m*). In a case of high treason (*n*), they were permitted to retire, in a body, to a tavern, where accommodations were provided for them by the sheriff; and six bailiffs were sworn well and truly to keep them together, and neither to speak to them themselves nor suffer any other to speak to them (*o*) touching any matter relating to the trial. A separation enabling the jurors to return to their homes is frequently permitted by the court in cases of misdemeanours, where the trial lasts more than a single day, the jury engaging to allow no one to speak to them on the subject of the trial.

And it is now enacted by the Juries Detention Act, 1897 (60 Vict. c. 18), that upon the trial of any person for a felony other than murder, treason, or treason felony, the court may, if it see fit, at any time before the jury consider their verdict, permit the jury to separate in the same way as the jury upon the trial of any person for misdemeanour were permitted to separate before that Act was passed.

If the jury separate, without leave of the court or after they have retired to consider their verdict, in a case of felony, and one of their number converse with a third person, a verdict of guilty delivered subsequently is bad, and may be treated as a nullity as upon a mistrial, and, as the prisoners have put themselves upon the country, they may be tried at

May not
separate in
felonies.

(*l*) 1 Chit. Cr. L. 632.

(*m*) *R. v. Kinnear* (1819), 2 B. & A. 462; *S. C.*, nom. *R. v. Woolf*, with learned notes, 1 Chit. R. 401.

(*n*) *R. v. Stone* (1796), 6 T. R. 530, which see for form of entry of adjournment on the record. This course was taken in *R. v. Williams*, indicted at the Old Bailey for forgery, in April, 1838, the trial of which occupied several days, including Sunday, on which day the jury took the air in carriages, attended by the sheriff's officers.

(*o*) *R. v. Fowler* (1821), 4 B. & A. 273.

the next sessions, and, if found guilty by another jury, a court of error will uphold the verdict, and a proper sentence passed upon them (*p*).

May have
witness
recalled.

When the jury retire, they may take with them any papers which have been proved in the cause, but no others (*q*). If any difficulty suggests itself to them in point of law, they may return into court and there receive the assistance of the bench; and if they desire to examine again any witness who has been called, they may request that he may be called again for their satisfaction, and the request will be granted; but they can ask him no question except in open court (*r*). If they desire to view the *locus in quo*, it is discretionary with the court to permit them, the court taking precautions to prevent improper communications being made to them at the view (*s*). If at such view statements are made in the absence of the prisoners, or not on oath, the evidence given should be taken on oath in open court on the return of the jury, and in presence of the prisoners (*t*). If one of the jurymen dies before the verdict is given, the survivors must be discharged, for the eleven can return no verdict; but a new indictment may be preferred against the prisoner.

May have
a view.

Death of juror
before verdict.

Jurors are not now punishable, except for gross acts of misconduct, as casting lots or tossing up for a verdict, or for actual corruption. Of the verdict itself they are the sole and absolute judges; if they return it in a legal form, the court must receive it; and unless they are guilty of embracery or indecent conduct, they can never be questioned civilly or criminally on account of their decision. The proceeding by writ of attain for false verdict had long fallen into disuse, and was abolished by the Juries Act, 1825 (*u*); but with a proviso "that every person who shall be guilty of the offence of embracery, and every juror who shall wilfully or corruptly consent thereto, shall and may be respectively proceeded against by indictment or information, and punished by fine or imprisonment, as every such person and juror might be before the passing of this Act" (*x*).

Attain
abolished.
Embracery
of jurors.

Of the verdict.
Delivery of
verdict.

The jury having agreed, signify that they are ready to deliver their verdict. If the jury retire to deliberate, their names must be called over when they return into court to deliver the verdict, and all the twelve must be within hearing when it is given. The officer then addresses the jury,—*"Gentlemen, are you agreed on your verdict; how say you, is A. B. guilty of the felony [or misdemeanour] whereof he stands*

(*p*) *R. v. Fowler* (1821), 4 B. & A. 273.

(*q*) 1 Inst. 227.

(*r*) 2 Hale, 296.

(*s*) *R. v. Martin* (1872), L. R. 1 C. C. R. 378.

(*t*) *Ibid.*

(*u*) 6 Geo. 4, c. 50, s. 60.

(*x*) *Ibid.* s. 61.

indicted, or not guilty?" The foreman delivers the verdict *guilty or not guilty*. In case of felony this verdict can only be received in open court, and in the prisoner's presence, though the court may be adjourned during the deliberation (*y*). In cases of misdemeanour, it may be delivered elsewhere, even out of the county by consent, and is often given in the defendant's absence (*z*). In general the assent of all the jury to the verdict pronounced by their foreman, if in their presence and hearing, is to be conclusively inferred, and no affidavit can be admitted to the contrary (*a*). And where on the trial of two prisoners for larceny one of the jurors delivered a verdict of not guilty, which was entered by the clerk in the minutes of the clerk of the peace, from which the record is made up, and also by the chairman, who heard the words "not guilty," in his note book, and the prisoner being thereupon discharged out of the dock, others of the jury interfering said the verdict was guilty, and the juror who had spoken said that he meant to say guilty, the prisoner was recalled into the dock, the verdict was again taken, and he was sentenced. It was held that the mistake had been corrected in time and the conviction proper (*b*).

Mode of
delivery of
the verdict.

Upon the trial of an indictment at the sessions, the court is the sole judge whether the entry of the verdict is proper or not; so that if, upon a special finding of a jury amounting to an acquittal, the chairman directs a verdict of guilty to be entered, which is done accordingly, the Court of King's Bench will not grant a *mandamus* commanding the minute to be entered according to the fact, and the proper course for the prisoner is to apply for a pardon (*c*). And sometimes the jury are requested to reconsider it, when it is manifestly against evidence; but in these last instances the interference requires great caution, and the jury may always persist in an absolute finding, however contrary to the opinion of the court. When they have finally delivered such verdict as can in point of law be received, the officer proceeds to address them,—

"Hearken to your verdict, as the court records it; you say A. B. is guilty (or 'not guilty') of the felony whereof he stands indicted (*and so of the others, if more than one*); that is your verdict, and so you say all."

The verdict is, at the same time, recorded by the officer on the indictment.

Recording the
verdict.

They may, as we have already seen, find a prisoner or defendant guilty on one count, and acquit him on others; or

Partial
verdicts.

(*y*) Co. Lit. 227 b; 1 Chitt. Cr. L. 636.

(*z*) *R. v. Woodfall* (1770), 5 Burr. 2667.

(*a*) *R. v. Woolter* (1817), 2 Stark. N. P. 111.

(*b*) *R. v. Fodden* (1853), 23 L. J. M. C. 7.

(*c*) *R. v. Suffolk (Justices)* (1835), 5 N. & M. 139; 3 *id.* Mag. Cas. 221, *sub nom.* *R. v. Hewes*, 3 A. & E. 725.

they may find him guilty of a part of a count where a substantive offence is charged and proved, and acquit him of the mere aggravations, provided the offence of which they convict him is of the same kind with that which the indictment set forth, and is included in it. Thus, on an indictment for stealing from the person, or in a dwelling-house, they may find the prisoner "guilty of stealing, but not from the person," or "not in the dwelling-house" (*d*); for the lesser charge is included in the greater, and both are felonies, although subjecting the offender to punishments differing in severity. Again, on an assault with intent to ravish, they may find the defendant guilty of a common assault, and acquit him of the intent; for both are misdemeanours, though the aggravated assault is punishable with hard labour, and the common assault with fine and imprisonment only. But they cannot in general find a prisoner guilty of a misdemeanour on an indictment for a felony; though it is true that a verdict of assault with intent to rob may be found (*e*) upon an indictment for robbery, but such an indictment is not triable at sessions. If upon the trial of any servant for feloniously taking from his master any corn, pulse, roots, or other food consumable by horses or other animals, such servant shall allege that he took the same under such circumstances as would constitute an offence punishable under 26 & 27 Vict. c. 103, and thereof shall satisfy the jury charged with his trial, then it shall be lawful for such jury to return a verdict accordingly; and thereupon the court before which such trial shall take place shall proceed to award such punishment against such servant as may be awarded by two justices of the peace on the conviction of any person under the provisions of that Act (*f*). The offence under that Act is, "if any servant shall contrary to the orders of his master take from his possession any corn, pulse, roots, or other food for the purpose of giving the same, or having the same given, to any horse or other animal belonging to or in the possession of his master"—and the punishment is, "at the discretion of two justices of the peace, either to be imprisoned, with or without hard labour, for any term not exceeding three months, or else to forfeit and pay such penalty as shall appear to them to be meet, not exceeding the sum of 5*l.*, and if such penalty shall not be paid, either immediately after the conviction or within such period as the justices shall at the time of the conviction appoint, the servant so offending shall be imprisoned, with or without hard labour, for any term not exceeding three months, unless such penalty shall be sooner paid; and so in case of non-payment of any penalty imposed by a court, he shall be

(*d*) See other instances, *ante*, p. 152.

(*e*) 24 & 25 Vict. c. 96, s. 41.

(*f*) 26 & 27 Vict. c. 103, s. 1.

imprisoned, with or without hard labour, for any term not exceeding three months, as the court shall order, unless such penalty be sooner paid" (*g*). If, upon the trial of any person for misdemeanour, it shall appear that the facts given in evidence amount in law to a felony, such person shall not by reason thereof be entitled to be acquitted of such misdemeanour; and no person tried for such misdemeanour shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had shall think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony, in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanour (*h*). As to a verdict of guilty of obtaining money, &c. by false pretences on proof of a larceny, see 24 & 25 Vict. c. 96, s. 88 (*i*). If there be several persons charged with a joint felony, they cannot be convicted severally of distinct felonies (*k*), except under the provisions of a statute; as in the case of receivers of stolen property, by virtue of 24 & 25 Vict. c. 96, s. 94, which enacts that if upon the trial of any two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part or parts of such property, the jury may convict such of the said persons as shall be proved to have received any part or parts of such property. But sentence may be passed on the one found guilty of the offence first in point of time, as the conviction may be treated severally as to each (*l*). And it should be borne in mind that on a charge of felony or misdemeanour, if upon the evidence the defendant did not complete the offence, he may be found guilty of an attempt to commit the same, and not guilty of the offence charged (*m*). If, of two persons indicted jointly for the same robbery, one appears to be innocent (as by having desisted from prosecuting his intent to rob), and the other guilty, but the prosecutor cannot identify which committed the offence, both must be acquitted (*n*). On indictment against three for burglary and stealing in a dwelling-house to the value of 40s., one pleaded guilty, and the other two were found guilty of stealing in a dwelling-house to the value of 40s.; both being then capital offences, seven judges were of opinion that judgment might be entered against one as guilty

Where on trial for misdemeanour the facts amount to felony.

(*g*) 26 & 27 Vict. c. 103, s. 1.

(*h*) 14 & 15 Vict. c. 100, s. 12.

(*i*) *Ante*, p. 153.

(*k*) *R. v. Messingham* (1830), 1 Moo. C. C. 257; *R. v. Gray* (1851), 2 Den. C. C. 86; *R. v. Matthews* (1850), 1 Den. C. C. 596. See *ante*, p. 147.

(*l*) *R. v. Gray*, *ubi sup.*; *R. v. Matthews*, *ubi sup.*

(*m*) 14 & 15 Vict. c. 100, s. 12.

(*n*) *R. v. Richardson* (1785), 1 Lea. C. C. 387.

Direction to jury to reconsider their verdict.

A lawful verdict must not be refused.

of the burglary and capital larceny, and against the two others as guilty of the capital larceny only; but two of the judges were of opinion that if a *nolle prosequi* was entered as to the party found guilty of the burglary, judgment might be given against all three for the capital larceny (*o*). This course had been taken in a previous case, where two were charged jointly with a capital larceny, and the finding was that one was guilty of capital and the other of simple larceny only, so that the judgments would be distinct (*p*). If they deliver a verdict which plainly amounts in law to an acquittal, as, on an indictment for receiving—"guilty of receiving, but not knowing the goods to be stolen;" on an indictment for larceny—"guilty of having the goods in his possession, but not of stealing them;" on an indictment for an assault—"guilty of the assault, but it was in self-defence;" the chairman should direct them to acquit; but if their meaning is expressed in doubtful terms, he should explain to them exactly the points by which their verdict must be governed, and send them back to reconsider it (*q*).

Where a chairman, through a mistake in the law in supposing that a conviction for a common assault could not be had on an indictment charging an assault occasioning actual bodily harm, told the jury on their finding such a verdict, before it was entered, that they must reconsider their verdict, and that they must either find the prisoner guilty of the charge in the indictment or acquit him, and they then found him guilty: the chairman passed sentence upon that verdict. It was held, upon a case reserved, that the first verdict ought to have been taken and that the second verdict could not stand, and that it was a mistrial, and that there ought to be a *venire de novo* (*r*). So, upon a count alleging an assault and a wounding and ill-treating, thereby doing actual bodily harm, a verdict of guilty of common assault justifies a conviction (*s*). So, where an indictment contained a count for unlawfully and

(*o*) *R. v. Butterworth* (1823), R. & Ry. 520. See *R. v. Turner* (n. d.), 2 East, P. C. 519. See 1 East, P. C. 371.

(*p*) *Ibid.*; *R. v. Hempstead* (1818), R. & Ry. 344. Prisoners were jointly indicted for stealing to above the value of 5*l*. in a dwelling-house, which was then capital. The second count resembled the first, except in laying the dwelling-house to be that of a different person. It was not shown that the prisoners acted together in the felony, or that the articles were not stolen by them at different times and unknown to each other, though when taken they were together, and stolen articles were found on each. Hempstead was capitally convicted of stealing to the value of 6*l*. in the dwelling-house, and Hudson of stealing to the value of 10*s*., being two different felonies, one capital, the other simple larceny, entailing different judgments. Held, that judgment could not be given against both prisoners, but that on a pardon given to Hudson, or *nolle prosequi* entered as to him, judgment might be given against Hempstead.

(*q*) See *R. v. Maloney* (1861), 9 Cox, C. C. 6.

(*r*) *R. v. Yeadon* (1861), 31 L. J. M. C. 70.

(*s*) *R. v. Oliver* (1860), 30 L. J. M. C. 12.

maliciously wounding, and another for unlawfully and maliciously inflicting grievous bodily harm, a verdict of guilty of an assault is a lawful verdict (*t*). And on an indictment charging an assault and carnally knowing and abusing, a verdict of common assault was held good (*u*). And where an indictment contained a count for maliciously inflicting grievous bodily harm, and another count for a common assault, it is sufficient to justify a conviction on the first count that the jury find the prisoner guilty of an aggravated assault and that the act was done intentionally and without cause, although also without premeditation, and under the influence of passion (*x*). There is no inconsistency in a general verdict of guilty on an indictment charging a larceny against the prisoner on one count and a receiving of the stolen goods in the other count; nor is there any inconsistency in such a case since 11 & 12 Vict. c. 46, s. 1, now repealed and re-enacted by 24 & 25 Vict. c. 94, s. 2, where the evidence proves the prisoner so convicted not to have been the actual thief, but to have been an accessory before the fact and a receiver afterwards (*y*); and upon an indictment charging a larceny by the prisoner on the first count and a receiving of the goods “so as aforesaid” feloniously stolen in the second, a verdict of not guilty on the first count and guilty on the second count is good, the words “so as aforesaid” being rejected (*z*).

What a jury may say in recommending a prisoner to mercy is not a matter upon which a case should be reserved for the opinion of the Court of Crown Cases Reserved, as, where upon a charge of larceny the jury found the prisoner guilty but recommended him to mercy, “believing that he intended ultimately to return the property,” the court considered that such recommendation was consistent with the verdict, inasmuch as their opinion may have had reference to his state of mind at a time subsequent to the taking, but thought that what they gave as their reason for recommending the prisoner to mercy ought not to be considered as part of the finding (*a*). So where the jury gave as the ground for their recommendation to mercy that perhaps the prisoner did not know that he was acting contrary to law, this addition was held not to invalidate their verdict of guilty (*b*).

Recommendation to mercy no part of verdict.

The jury have a right to deliver a special verdict, that is, a verdict finding all the facts specially, and leaving the court to give judgment according to their legal effect. Such verdict

Special verdict.

(*t*) *R. v. Taylor* (1869), L. R. 1 C. C. R. 194.

(*u*) *R. v. Guthrie* (1870), L. R. 1 C. C. R. 241.

(*x*) *R. v. Sparrow* (1860), 30 L. J. M. C. 43.

(*y*) *R. v. Hughes* (1860), 29 L. J. M. C. 71.

(*z*) *R. v. Huntley* (1860), 29 L. J. M. C. 70; *R. v. Craddock* (1850), 2 Den. C. C. 31.

(*a*) *R. v. Trebilcock* (1858), 27 L. J. M. C. 103.

(*b*) *R. v. Crawshaw* (1860), Bell, C. C. 303.

must find all the circumstances distinctly as facts, for the court cannot supply anything by implication or inference. If the circumstances so found do not substantially support the indictment (with the qualifications already referred to), no judgment can be passed, although they may show the prisoner to be guilty of a different offence (*c*).

On an indictment for a common assault on a girl nine years of age, a special verdict of "guilty, the child being an assenting party, but that from her tender years she did not know what she was about": held to amount to not guilty, the verdict showing an assent by the girl (*d*). A verdict of not guilty of stealing the watch, but guilty of keeping possession of it, in the hope of reward from the time he first had the watch, is a verdict of not guilty (*e*). Where, upon an indictment for obtaining goods by false pretences contained in forged letters, the jury said, on giving their verdict, that "We find the person guilty of obtaining the property by the false representations in the two forged letters, and that the parties would not have parted with it without those letters having been used, but we think that he meant to pay for them," it was held that the judge was right in refusing to receive this verdict, on the ground that they must find whether the prisoner had a fraudulent intention or not, and that if he had they must find him guilty, and if he had not, not guilty, and sending them back to reconsider the matter. They then found a verdict of guilty, which was held to be their true verdict (*f*).

Indictment for larceny: verdict "Guilty, but he had no intention of stealing the goods when they first came into his possession," would be a verdict of "not guilty" (*g*).

The court may reserve any question of law arising on the trial for the consideration of the Court of Crown Cases Reserved; but what a jury may say in recommending a prisoner to mercy is not a proper matter to be reserved for the Court of Crown Cases Reserved (*h*).

The verdict cannot be altered after it is once *recorded*; but it may be, and often is, altered after it has been *pronounced*, at the suggestion of the court, if its terms imply a contradiction, or are accompanied by something which renders the meaning doubtful. Where a verdict is thus offered by the jury, but not immediately accepted and recorded by the court,

Pronouncing,
altering and
recording
verdict.

(*c*) 2 Stra. 1015; 1 Chitt. Cr. L. 643.

(*d*) *R. v. Read* (1848), 1 Den. C. C. 377.

(*e*) *R. v. York* (1848), 18 L. J. M. C. 38.

(*f*) *R. v. Meany* (1862), 32 L. J. M. C. 24; and it is there said, "The judge has a right, and sometimes it is his bounden duty, to tell the jury they ought to reconsider their verdict. He is not bound to receive their first verdict unless the jury insist upon having it recorded."

(*g*) *R. v. Glass* (1847), 1 Den. C. C. 215.

(*h*) *R. v. Trebilcock*, *sup.*

it has been the practice for some clerks of the peace to enter a note of it in the minute book of the sessions, as a memorandum of the proceedings as they go on, and afterwards to record the ultimate finding on the indictment in the usual manner (*i*). A jury at sessions, on an indictment for poisoning mares, found the accused "guilty by mischance." This was entered by the clerk of the peace in his minute book. The defendant's counsel submitted that this finding amounted to an acquittal; and the chairman told the jury to find the prisoner guilty, or not guilty, directing them to reconsider their verdict. They retired, and afterwards gave their verdict "guilty; but recommended to mercy." The clerk of the peace recorded that finding, with the recommendation, on the indictment in the usual manner. After which the court asked the jury the ground of their recommendation. They answered, that the prisoner did not do it with a malicious intent, but to benefit the condition of the horses. On a motion to the King's Bench for a mandamus to the sessions to alter the minutes of the verdict according to the fact, &c., on an affidavit that the verdict was erroneously entered on the trial, the court refused to interfere with the minutes, the quarter sessions being a court of competent criminal jurisdiction (*k*).

In recording a verdict the word "misdemeanour" is *nomen collectivum*, and if the indictment charges an assault with intent to ravish in one count and a common assault in another count, a statement on the record that the prisoner was found guilty of the misdemeanour and offence in the said indictment specified, is in effect that he has been found guilty of the whole matter charged by the indictment, so as to warrant a judgment of a sentence applicable to the first count of the indictment but inapplicable to the second count (*l*); but felony is not *nomen collectivum*, and in an indictment for felony, whether it is or is not permitted to charge the same felony in different ways in different counts in the same indictment, when there are more than one count for felony in the indictment, it is wrong to record the award of jury process or verdict as for the felony aforesaid, and a *venire de novo* would be awarded on a writ of error by the Court of King's Bench (*m*). And where the indictment contains two counts for a misdemeanour, and the jury find a verdict of guilty on the second count, and are silent as to the other count, and the

Recording
the verdict.

(*i*) See *R. v. Hewes* (1835), 3 A. & E. 725.

(*k*) *R. v. Hewes*, *sup.* See *ante*, p. 347; *Walcott's case* (1694), Mod. 395, afterwards confirmed in Dom. Proc., and *R. v. Yecoveley* (*Inhab.*) (1838), 8 A. & E. 806, *ante*, p. 31. The record of a quarter sessions is not necessarily on parchment.

(*l*) *R. v. Powell* (1831), 2 B. & Ad. 75; *Ryalls v. R.* (1848), 11 Q. B. 781, 798.

(*m*) *Campbell v. R.* (1846), 11 Q. B. 799.

entry of the verdict is so made, and therefore the first count appears to be undisposed of, this is no error so as to vitiate the judgment on the second count, because each count stands by itself as a separate indictment and is not affected by the other (*n*); but it is better to apply to the court before which the trial is had to have the findings duly entered on all the issues.

New trial.

It would seem that no new trial can be granted on the merits (*e.g.*, that the verdict was against the evidence) in cases tried at sessions: not by the High Court, because the King's Bench Division "will not intrude upon all the inferior jurisdictions in the Kingdom by removing their proceedings for the purpose of examining the evidence on which the verdicts have been obtained" (*o*), nor by the court of quarter sessions itself, because "the setting aside a verdict of a jury is too great a power to be intrusted to an inferior jurisdiction" (*p*). But it would seem that the quarter sessions can set aside a verdict and order a new trial upon the ground of irregularity in the proceedings (*q*), and the court may request the jury to reconsider the verdict; and where the punishment is discretionary may mark its opinion of the case by passing a nominal sentence, or may recommend the party to the crown, through the secretary of state, as a proper object of pardon, and may respite execution on the judgment (*r*). A verdict of acquittal, when returned on a valid indictment, is always conclusive when pleaded in bar to any subsequent indictment *for the same charge*, but does not prevent a party from being afterwards indicted on another charge having reference to the same transaction—except when on a charge of larceny it appears to be embezzlement, or *vice versa* (*s*), or on a charge of false pretences if it appear to be larceny (*t*). But apart from statute, if a party be acquitted of a felony, on the ground that the proof only sustains a charge of misdemeanour, he may afterwards be tried on a bill found for the misdemeanour. A new trial of the same indictment is never granted by any court after a verdict of *acquittal* (*u*), not even in the Court of King's Bench, after a verdict on an indictment for obstructing a highway removed by *certiorari* (*x*). Even on indictments for

(*n*) *Latham v. R.* (1864), 33 L. J. M. C. 197; *R. v. Jones* (1839), 2 Moo. C. C. 94.

(*o*) *Per* Ellenborough, C. J., in *R. v. Oxford (Inhab.)* (1811), 13 East, 416.

(*p*) *Per* Lord Mansfield, C. J., in *R. v. Peters* (1758), 1 Burr. 571.

(*q*) *R. v. Peters, ubi sup.* And see authorities collected in note to *R. v. Oxford, ubi sup.*

(*r*) 2 Hale, P. C. 309.

(*s*) 24 & 25 Vict. c. 96, s. 72.

(*t*) *Ibid.* s. 88.

(*u*) *R. v. Reynell* (1805), 6 East, 315; see *R. v. Parry* (1837), 7 C. & P. 836; *R. v. Cohen* (1816), 1 Stark. N. P. 516; *R. v. Burbon* (1816), 5 M. & S. 392.

(*x*) *R. v. Johnson* (1860), 29 L. J. M. C. 133.

not repairing roads and bridges, which are substantially civil proceedings, the utmost the Court of King's Bench will do after acquittal is to suspend the judgment until after the trial of another indictment, in order to prevent the acquittal from being given in evidence at such subsequent trial to disprove the liability of the parties acquitted (*y*). It is submitted that it is competent to the court to take a similar course where the acquittal upon such an indictment takes place at quarter sessions. Acquitted prisoners may, it seems, be detained till the grand jury is discharged. Prisoners against whom no bill is preferred or found are discharged at the end of the sessions by proclamation. Discharge of prisoners.

Since the passing of the 33 & 34 Vict. c. 23, no confession, verdict, conviction or judgment of or for any felony shall cause any attainder or corruption of blood, or any forfeiture or escheat, provided that nothing in that Act is to affect the law of forfeiture consequent upon outlawry (*z*). Provided nevertheless, that if any person hereafter convicted of felony, for which he shall be sentenced to penal servitude, or any term of imprisonment with hard labour, or exceeding twelve months, shall at the time of such conviction hold any military or naval office, or any civil office under the crown or other public employment, or any ecclesiastical benefice, or any place, office or emolument in any university, college or other corporation, or be entitled to any pension or superannuation allowance payable by the public, or out of any public fund, such office, benefice, employment or place shall forthwith become vacant, and such pension, superannuation, allowance or emolument shall forthwith determine and cease to be payable unless such person shall receive a free pardon from his Majesty within two months after such conviction, or before the filling up of such office, benefice, employment or place if given at a later period; and such person shall become, and (until he shall have suffered the punishment to which he had been sentenced, or such other punishment as by competent authority may be substituted for the same, or shall receive a free pardon from his Majesty) shall continue thenceforth incapable of holding any military or naval office, or any civil office under the crown or other public employment, or any ecclesiastical benefice, or of being elected, or sitting, or voting as a member of either house of parliament, or of exercising any right of suffrage or other parliamentary or municipal franchise whatever within England, Wales, or Ireland. Forfeitures, &c. abolished.

By 7 Geo. 4, c. 64, s. 21, *no judgment after verdict upon any indictment or information for any felony or misdemeanor shall be stayed or reversed for want of a similiter, nor by reason that the jury process has been awarded to a wrong* Aider by verdict.

(*y*) *R. v. Wandsworth (Inhab.)* (1817), 1 B. & A. 63; *R. v. Challicombe* (1842), 6 Jurist, 481; *R. v. Sutton* (1833), 5 B. & Ad. 52.

(*z*) Sect. 1.

officer on an insufficient suggestion ; nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors ; nor because any person has served on the jury who has not been returned as a juror by the sheriff or other officer ; and where the offence charged has been created or else subjected to a greater degree of punishment by any statute, the indictment or information shall, after verdict, be held sufficient to warrant the punishment prescribed by the statute, if it describe the offence in the words of the statute (*a*).

At common law where there was any defect, imperfection or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined were such as necessarily required upon the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it was not to be presumed that either the judge would have allowed the jury to give, or the jury would have given, the verdict, such defect, imperfection or omission was cured by verdict (*b*). It was said by the learned author of this work (1st ed., p. 323) that there is no distinction in such a case between the pleadings in civil and criminal cases. But the present editors feel themselves unable to subscribe to this doctrine. In 1 Chitty Cr. Law, p. 172, it is said, "It is further laid down that an indictment ought to have the same certainty as a declaration, for all the rules that apply to civil pleadings are applicable to criminal accusations. The last observation does not, indeed, sufficiently express the degree of precision required ; for technical objections have been more frequently admitted to prevail in criminal than in civil proceedings, and it was expressly laid down by Lord Mansfield (*c*) that a greater strictness is required in the former than is necessary in the latter, and in the first a defendant is allowed to take advantage of more formal exceptions." It is submitted that *defective* or *imperfect* averments in indictments will be cured by verdict, but (except in cases provided for by the statute 7 Geo. 4, c. 64, s. 21) that the entire *omission* of a material averment will not be so cured, and this is conformable to the rule as it is laid down by the late Sir James Fitzjames Stephen in his Law of Criminal Procedure, Art. 259. By way of illustration : An indictment for false pretences which alleges that the prisoner obtained the goods by "a certain false pretence," without setting out the false pretence, although, doubtless, bad upon demurrer, would thus be good after verdict, the allegation being imperfect, but an indictment which entirely omitted the allegation as to the false pretence altogether, and merely

(*a*) *Nash v. R.* (1864), 33 L. J. M. C. 94.

(*b*) Saunders, by Lush, 2nd ed. 1223 ; Wms. Saund. 228, n. (1), and authorities there cited.

(*c*) 1 Leach, at p. 134.

alleged that the defendant "unlawfully did obtain" certain goods, &c., would, it is submitted, be bad even after verdict (*d*).

An indictment charged a conspiracy at common law to do an act contrary to the Debtors Act, 1869, that is to say, that the defendants conspired with one M. H., being a trader and liable to become bankrupt, within four months before the presentation of a bankruptcy petition, fraudulently to remove property of the said M. H. to the value of 10*l*., without containing any allegation that it was in contemplation of a petition in bankruptcy; the omission was held, upon a writ of error, cured by verdict, though the court said that it might possibly have been a good objection on demurrer (*e*).

So, upon an indictment for receiving goods unlawfully obtained by false pretences, an omission to set forth the particular false pretences made use of, even if an objection on demurrer, was held to be cured by verdict (*f*).

An indictment for receiving stolen goods which omitted to aver that the prisoner knew that they were stolen was held bad after verdict (*g*).

SECTION 13.

OF JUDGMENT AND SENTENCE AND ORDER OF RESTITUTION.

On plea by the party charged, or verdict by the jury, of guilty, the party charged is said to be *convicted* of the crime whereof he stands indicted (*h*). On that conviction *judgment* may or may not follow (*i*).

(*d*) *Heymann v. R.* (1873), L. R. 8 Q. B. 102; *R. v. Goldsmith* (1873), L. R. 2 C. C. R. 74. For an instance of a plea to an indictment against a parish for non-repair of a highway being held bad after verdict because it omitted a material averment, see *R. v. Eastington (Inhab.)* (1836), 5 A. & E. 765. The plea in this case was held bad because it did not show what party, other than the defendants, was liable to repair.

(*e*) *Heymann v. R.* (1873), L. R. 8 Q. B. 102; and see *Nash v. R.* (1864), 33 L. J. M. C. 94.

(*f*) *R. v. Goldsmith, sup.*; *Latham v. R.* (1864), 33 L. J. M. C. 197.

(*g*) *R. v. Larkin* (1854), 23 L. J. M. C. 125, in which case the clerk who engrossed the indictment had, by mistake, written the name of the prosecutor instead of that of the prisoner in the averment of knowledge.

(*h*) 4 Bla. Com. 329, 362.

(*i*) *Ibid.*; and see *Sutton v. Bishop* (1768), 1 W. Bla. 665.

In cases of felony the prisoner is called upon to show cause why judgment should not be given. This is done by the clerk of the peace, who addresses the prisoner thus: "Prisoner at the bar, you stand convicted of felony: what have you to say why the court should not give you judgment, according to law?"

This is the prisoner's opportunity to move in arrest of judgment, if he has any ground for so doing, or to offer something in extenuation of his offence (*k*). He may also apply to the chairman at this stage to state a case for the consideration of the Court for Crown Cases Reserved if such application has not already been made.

It is only in cases of felony that it is customary thus to "call upon" the prisoner.

If the court thinks the indictment bad, and not cured by verdict, the judgment may be suspended, so that another and amended bill may be preferred (*l*).

Motion in
arrest of
judgment.

Thus, where an indictment for receiving stolen goods omitted to allege a *scienter* in the prisoner, owing to the count being drawn with the prosecutor's name being inserted instead of the prisoner's before that allegation, the prisoner had a right to move in arrest of judgment, and to have the judgment arrested on that ground (*m*). Thus, the want of the allegation of a *scienter* in such a case is not deemed a formal defect within the 25th sect. of the 14 & 15 Vict. c. 100, which requires every objection to an indictment for any formal defect apparent on the face thereof to be taken by demurrer or motion to quash the indictment before the jury shall be sworn, and not afterwards.

In the case of an indictment with some good and some bad counts, after a verdict for the crown upon all the counts, the court ought to arrest the judgment on the bad counts and pass sentence on the good counts. Should it, however, have pronounced judgment generally, on a writ of error the court of error may now order judgment to be arrested on all the bad

(*k*) 4 Bla. Com. 375.

(*l*) *Ibid.*; 3 Bla. Com. 407; *R. v. Goddard* (1702), *Ld. Raym.* 920. A person was indicted for a misdemeanour in fixing a lighted candle in a closet, under certain wooden stairs in the house of J. R., of which house he the prisoner was then *possessed* for a certain unexpired term, and for putting matches about and against the said lighted candle, with a wicked and malicious intention, by means thereof then and there *feloniously* to set fire to the aforesaid house of the said J. R., and to burn and consume the same. It was objected in arrest of judgment, that alleging the act to be done *feloniously* made it necessary to prove a felony; which the possession of the house by the prisoner prevented. But Lord Mansfield and the court rejected the word *feloniously* as surplusage, and repugnant to the legal import of the offence charged, and gave judgment against the defendant for the misdemeanour of which he had been in fact convicted: *R. v. Seafeld* (1784), *East's P. C.* 1028; *R. v. Holmes* (1631), *id.* 1023.

(*m*) *R. v. Larkin* (1854), 23 L. J. M. C. 125.

counts and pronounce the proper judgment on all the good counts, or on the one good count, if one only be good (*n*).

So, after verdict, the words of the different counts of an indictment will be construed *ut res magis valeat quam pereat*, and so as to avoid, if possible, a repugnancy; thus words in one count incorporating another count will be restrained, so as to limit their meaning to apply to so much only as will make the count containing the words of reference good (*o*). An irregularity in the trial may be made the ground for quashing the verdict and ordering a *venire de novo*: thus, where the record at the quarter sessions, after stating that the defendants were indicted for stealing oats, to which they pleaded not guilty, and a verdict of guilty thereon, added, "that because it appeared to the justices that after the jury had retired one of them had separated from the other jurors and conversed respecting the verdict with a stranger, it was considered that the verdict was bad," and it was therefore quashed, and a *venire de novo* awarded to the next sessions, and it then proceeded to set out the appearance of the parties at such sessions, and the trial and conviction by the second jury, whereupon all and singular the premises being seen and considered judgment was given, it was held on a writ of error that such judgment was right (*p*).

Sentence is usually passed immediately, or at all events during the sessions, but if at the end of the sessions the court has still doubt respecting the application of the law to the fact, or of the fact to the indictment, or wishes time to examine the circumstances of the offence and the character of the offender, the sessions should be adjourned to some future day, before or not later than that on which the next sessions would be held, in order to give opportunity for consultation and more matured advice or inquiry, as the case may require (*q*). A witness being indicted for perjury has been held not a reason for postponing sentence (*r*). An improper prayer of judgment in any criminal pleading subsequent to the indictment, as, that the defendant may answer over, where it should have been a prayer of final judgment against him, shall not bind the court, but it will give such judgment as by law ought to be given (*s*). Upon an adjournment, however, the prisoner will either be recommitted to custody or, if he has been out on bail, be allowed to enter into a new recognizance to appear at the period of adjournment, or when called on to

Of postponing sentence.

(*n*) *R. v. Holloway* (1851), 2 Den. C. C. 287.

(*o*) *R. v. Craddock* (1850), 20 L. J. M. C. 31; *R. v. Huntley* (1860), 29 L. J. M. C. 70.

(*p*) *R. v. Fowler* (1821), 4 B. & A. 273.

(*q*) *Ante*, p. 33.

(*r*) *R. v. Haydon* (1762), 1 W. Bl. 404.

(*s*) *R. v. Josiah Taylor* (1824), 3 B. & C. 512. See *Street v. Hopkinson* (1736), Stra. 1055.

receive judgment, according to the discretion of the justices. It is scarcely necessary to add, that this delay of sentence being a forbearance in favour of the prisoner, whether it be in compliance with his solicitation, or emanate immediately from the court, it would not be compatible with the claims of justice to place the security of his person for receiving the judgment of the law upon a *more* precarious foundation *after* verdict, than it was *before*; and that, in the circumstances under contemplation, some deference is due to the application of the prosecutor, as well as to the opinion of the court, respecting the recognizances by which the liberation of his person may be justified.

In cases of felony, the prisoner is placed at the bar, and the sentence is pronounced by the chairman. Every sentence pronounced by any court of general or quarter sessions or adjourned sessions of the peace takes effect from the time of the same being pronounced, unless the court otherwise direct (*t*).

Improper judgment may be corrected on a writ of error.

Formerly if a judgment of quarter sessions were bad for excess of punishment, or inflicting hard labour where such punishment is not justified by statute, *e.g.*, for sentencing a convict to imprisonment or penal servitude for a longer time than is allowed by law, such judgment was bad *in toto*, and would not operate as a good judgment for the proper period, and would be reversed in error (*u*). But now by 11 & 12 Vict. c. 78, s. 5, whenever any writ of error shall be brought upon any judgment, upon any indictment, information, presentment or inquisition in any criminal case and the court of error shall reverse the judgment, it shall be competent for such court of error either to pronounce the proper judgment or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, &c. But in practice the occurrence of such a mistake as an excess of punishment would be corrected by the Home Secretary, upon an application to him stating the circumstances.

Punishment in cases of felony.

The punishment of a felony is, in all cases, that prescribed by the statute or statutes specially relating to it (*x*); and is awarded in terms by sentence passed by the court after conviction.

In felonies where no punishment specially provided.

Persons convicted of "any felony, for which no punishment is specially provided by any Act," are punishable by penal servitude for seven years or imprisonment for any term not exceeding two years (*y*). Hard labour may also be added to the imprisonment in the common gaol or house of correction (*z*).

(*t*) 21 & 22 Vict. c. 73, s. 12.

(*u*) *R. v. Ellis* (1826), 5 B. & C. 395; *Bourne v. R.* (1837), in error, 6 L. J. M. C. 129; *R. v. Silversides* (1842), 3 Q. B. 406.

(*x*) 7 & 8 Geo. 4, c. 28, s. 8.

(*y*) *Ibid.*; 20 & 21 Vict. c. 3, s. 2.

(*z*) 7 & 8 Geo. 4, c. 28, s. 9.

By 20 & 21 Vict. c. 3, s. 2, no person shall be sentenced to transportation; and any who, if this Act had not been passed, might have been sentenced to transportation shall be liable to be sentenced to be kept in penal servitude for a term of the same duration as the term of transportation to which such person would have been liable if this Act had not been passed; and in every case where, at the discretion of the court, one of any two or more terms of transportation might have been awarded, the court shall have the like discretion to award one of any two or more of the terms of penal servitude which are hereby authorized to be awarded instead of such terms of transportation: Provided always, that any person who might at the discretion of the court have been sentenced either to transportation for any term or to any period of imprisonment, shall be liable, at the discretion of the court, to be sentenced either to penal servitude for the same term or to the same period of imprisonment; and in any case in which before the passing of the said Act sentence to seven years' transportation might have been passed, it shall be lawful for the court in its discretion to pass a sentence of penal servitude of not less than three years.

Transportation abolished.

Penal servitude substituted.

By the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69), it is enacted (sect. 1 (1)), that where under any enactment in force when this section comes into operation a court has power to award a sentence of penal servitude, the sentence may, at the discretion of the court, be for any period not less than three years, and not exceeding either five years, or any greater period authorized by the enactment. By sect. 1 (2) where under any Act now in force or under any future Act a court is empowered or required to award a sentence of penal servitude, the court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years, with or without hard labour.

Where by any statute a prisoner who has been previously convicted of any offence is liable to a more severe punishment on account of such previous conviction, he is entitled to have such previous conviction charged in the indictment, and to have the verdict of the jury upon the question of his identity, otherwise the power of inflicting a heavier sentence cannot be acted upon (a).

By 7 Will. 4 & 1 Vict. c. 90, it was enacted, that it should not be lawful for any court to direct that any offender should be kept in solitary confinement for any longer periods than one month at a time, or than three months in the space of one year.

As to solitary confinement.

By 34 & 35 Vict. c. 112, s. 8, where any person is convicted on indictment of a crime, and a previous conviction of a crime

Police supervision.

(a) *R. v. Willis* (1872), L. R. 1 C. C. R. 363; *R. v. Summers* (1869), L. R. 1 C. C. R. 182.

is proved against him, the court having cognizance of such indictment may, in addition to any other punishment which it may award to him, direct that he is to be subject to the supervision of the police for a period of seven years, or such less period as the court may direct, commencing immediately after the expiration of the sentence passed on him for the last of such crimes.

By sect. 9, the rules contained in the 24 & 25 Vict. c. 96, s. 116, in relation to the form of and the proceedings upon an indictment for any offence punishable under that Act committed after previous conviction shall, with the necessary variations, apply to any indictment for committing a crime under this Act, after previous conviction for a crime, whether the crime charged in such indictment or the crime to which such previous conviction relates be or be not punishable under the said Act of 24 & 25 Vict. c. 96.

By sect. 20, the expression "crime" means any felony, or the offence of uttering false or counterfeit coin, or of possessing counterfeit gold or silver coin, or the offence of obtaining goods or money by false pretences, or the offence of conspiracy to defraud, or any misdemeanour under 24 & 25 Vict. c. 96, s. 58.

Commitment
to certified
reformatory
school.

The Reformatory Schools Act, 1893 (47 & 48 Vict. c. 48), enacts as follows:—Sect. 1. Where a youthful offender who, in the opinion of the court before whom he is charged, is less than sixteen years of age is convicted, whether on indictment or by a court of summary jurisdiction, of an offence punishable with penal servitude or imprisonment, and either—

- (a) appears to the court to be not less than twelve years of age; or
- (b) is proved to have been previously convicted of an offence punishable with penal servitude or imprisonment,

the court may, in addition to or in lieu of sentencing him according to law to any punishment, order that he be sent to a certified reformatory school, and be there detained for a period of not less than three, and not more than five years; so, however, that the period is such as will, in the opinion of the court, expire at or before the time at which the offender will attain the age of nineteen years.

And by sect. 2, without prejudice to any other powers of the court, the court may direct that the offender be taken to a prison, or to any other place, not being a prison, which the court thinks fit, and the occupier of which is willing to receive him, and be detained therein for any time not exceeding seven days, or in case of necessity for a period not exceeding fourteen days, or until an order is sooner made for his discharge or for his being sent to a reformatory school, or otherwise dealt with under this or any other Act, and the person to whom the order is addressed is hereby empowered

and required to detain him accordingly, and if the offender escapes he may be apprehended without warrant and brought back to the place of detention.

The particular school to which the youthful offender is to be sent may be named either at the time of his sentence being passed, or within seven days thereafter by the court or justices who sentenced him, or in default thereof at any time before the expiration of his imprisonment by any visiting justice of the prison to which he is committed.

In choosing a certified reformatory school the court or justices or visiting justice shall endeavour to ascertain the religious persuasion to which the youthful offender belongs, and so far as possible a selection shall be made of a school conducted in accordance with the religious persuasion to which the youthful offender appears to the court or justices or visiting justice to belong, which persuasion shall be specified by the court and justices or visiting justice (*b*). In case the offender is ordered to be sent to a school not conducted in accordance with the religious persuasion of the offender, the parent, step-parent or guardian, or if there be none such, the god-parent or nearest adult relative may apply to the court who passed sentence to send or remove the offender to a certified reformatory school conducted in accordance with the religious persuasion of the offender, and the court shall comply with such request upon proof of such religious persuasion, and that the application was made before the offender was sent to the school, or within thirty days after his arrival at such school; and secondly, that the applicant should show to the satisfaction of the court or visiting justice that the managers of the school named by him are willing to receive the offender (*c*).

By 34 & 35 Vict. c. 112, s. 14, where any woman is convicted of a crime (for the meaning of crime, see sect. 20, *ante*), and a previous conviction of a crime is proved against her, any children of such woman under the age of fourteen years who may be under her care and control at the time of her conviction for the last of such crimes, and who have no visible means of subsistence, or are without proper guardianship shall be deemed to be children to whom the provisions of the Industrial Schools Act, 1866 apply, and the court by whom such woman is convicted, or two justices, or a magistrate shall have the same power of ordering such children to be sent to a certified industrial school as is vested in two justices or a magistrate by the 14th section of the Industrial Schools Act, 1866, in respect of the children in the said section described.

By 29 & 30 Vict. c. 118, s. 18 (the Industrial Schools Act, 1866), the order of justices or a magistrate sending a child

Order of detention of children in a certified industrial school.

Detention in certified industrial school of children of a convicted mother.

(*b*) Reformatory Schools Act, 1866 (29 & 30 Vict. c. 117), s. 11.
(*c*) *Ibid.* s. 16.

to a school (in this Act referred to as the order of detention in a school) shall be in writing signed by the justices or magistrate, and shall specify the name of the school.

The school shall be some specified industrial school (whether situate within the jurisdiction of the justices or magistrate making the order or not), the managers of which are willing to receive the child; and the reception of the child by the managers of the school shall be deemed to be an undertaking by them to teach, train, clothe, lodge and feed him during the whole period for which he is liable to be detained in the school, or until the withdrawal or resignation of the certificate of the school takes effect, or until the contribution out of money provided by Parliament towards the custody and maintenance of the children detained in the school is discontinued, whichever shall first happen.

In determining on the school the justices or magistrates shall endeavour to ascertain the religious persuasion to which the child belongs, and shall, if possible, select a school conducted in accordance with such religious persuasion, and the order shall specify such religious persuasion.

The order shall specify the time for which the child is to be detained in the school, being such time as to the justices or magistrate seems proper for the teaching and training of the child, but not in any case extending beyond the time when the child will attain the age of sixteen years.

By sect. 19, two justices or a magistrate, while inquiry is being made respecting a child or respecting a school to which he may be sent, may by order signed by them or him, order the child to be taken to the workhouse, or poorhouse of the union, parish or combination in which he is found or resident, and to be detained therein at the cost of the union, parish or combination for any time not exceeding seven days, or until an order is sooner made for his discharge, or for his being sent to a certified industrial school; and the guardians of the poor for the union or parish, or the keeper of the poorhouse, or other person to whom the order is addressed, are and is hereby empowered and required to detain him accordingly.

By sect. 22, the order of detention in a school shall be forwarded to the managers of the school with the child, and shall be sufficient warrant for the conveyance of the child thither and his detention there.

By sect. 23, the expense of conveying to a certified industrial school a child ordered to be sent there shall be defrayed by the police authorities by whom he is conveyed, and shall be deemed part of the current expenses of those police authorities.

Condemning
prisoner in the
costs of the
prosecution.

By 33 & 34 Vict. c. 23, s. 3, any court by which judgment shall be pronounced or recorded upon the conviction of any person for treason or felony, in addition to such sentence as may otherwise by law be passed, may condemn such person to the payment of the whole or any part of the costs or expenses

incurred in and about the prosecution and conviction for the offence of which he shall be convicted, if to such court it shall seem fit so to do; and the payment of such costs and expenses or any part thereof may be ordered by the court to be made out of any moneys taken from such person on his apprehension, or may be enforced at the instance of any person liable to pay or who may have paid the same, in such and the same manner (subject to the provisions of this Act) as the payment of any costs ordered to be paid by the judgment or order of any court of competent jurisdiction in any civil action or proceeding may for the time be enforced: Provided that in the meantime and until the recovery of such costs and expenses from the person so convicted as aforesaid or from his estate, the same shall be paid and provided for in the same manner as if this Act had not passed; and any money which may be recovered in respect thereof from the person so convicted, or from his estate, shall be applicable to the reimbursement of any person or fund by whom or out of which such costs and expenses may have been paid or defrayed.

By sect. 4, it shall be lawful for any such court as aforesaid, if it shall think fit, upon the application of any person aggrieved, and immediately after the conviction of any person for felony, to award any sum of money, not exceeding 100*l.*, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony, and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the court to be paid under the last preceding section of this Act.

Order for compensation for loss of property lost through a felony.

The punishments in ordinary cases of misdemeanour, where they are not specially apportioned by any Act of Parliament, are fine or imprisonment, or both, in the discretion of the court; with a further requisition of security (if the court shall deem fit) for the good behaviour of the party convicted, during a reasonable period.

The punishments for misdemeanours.

On conviction upon indictment of any assault with or without battery or wounding, or either of them, the defendant may, in addition to any other sentence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall, by affidavit or other inquiry and examination, ascertain to be reasonable; and unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award, not exceeding three months, in addition to the term of imprisonment, if any, to which the offender may be sentenced for the offence (*d*).

Order for payment of prosecutor's costs by the defendant in assaults.

Provision is made for levy of such sum by distress and sale of the goods of the offender and for payment of any surplus to the owner, and that in case such sum shall be so levied the imprisonment awarded until payment of such sum shall thereupon cease (*e*).

Hard labour.

In cases of misdemeanour, the court was formerly not authorized to sentence parties to be kept to hard labour in addition to imprisonment, and their confinement in idleness often became a cause of their increased depravity. But by 3 Geo. 4, c. 114, the court may sentence to imprisonment with *hard labour* for not exceeding the term for which it might previously imprison, either in addition to or in lieu of any other punishment which might then be inflicted, in the following cases :—

Attempt to commit felony.

Riot.

Keeping a common gaming-house, a common bawdy-house, or a common disorderly house.

Wilful and corrupt perjury, or subornation of perjury.

Knowingly uttering counterfeit money (*f*), and other misdemeanours under 24 & 25 Vict. c. 99.

By 9 Geo. 4, c. 69, s. 1, for having entered ground by night with intent there illegally to take or kill game or rabbits, with any instrument for the purpose of taking game, after two summary convictions for the same offence.

Hard labour
in mis-
demeanours.

By 14 & 15 Vict. c. 100, s. 29, whenever any person shall be convicted of any one of the offences following, that is to say :—

Any cheat or fraud punishable at common law ;

Any conspiracy to cheat or defraud, or to extort money or goods, or falsely to accuse of any crime, or to obstruct, prevent, pervert, or defeat the course of public justice ;

Any escape or rescue from lawful custody on a criminal charge ;

Any public and indecent exposure of the person ;

Any public selling or exposing for public sale or to public view of any obscene book, print, picture, or other indecent exhibition ;

it shall be lawful for the court to sentence the offender to be imprisoned for any term now warranted by law, and also to be kept to hard labour during the whole or any part of such term of imprisonment.

Hard labour

By 24 & 25 Vict. c. 100, s. 38, the court may sentence the

(*e*) 24 & 25 Vict. c. 100, s. 75.

(*f*) *Ibid.* c. 99, s. 9.

offender to be imprisoned with or without *hard labour*, for any term not exceeding two years, in the following cases of *assault*, some of which, it will be seen, are, and others are not, included in the former statute :—

Assault with intent to commit felony.

Assault upon any peace officer in the due execution of his duty, or upon any person acting in aid of such officer.

Assault upon any person with intent to resist or prevent the lawful apprehension or detainer of the party so assaulting, or of any other person for any offence.

And by 24 & 25 Vict. c. 100, s. 47, in cases of assaults occasioning actual bodily harm and *common* assaults.

The place of imprisonment was formerly always the common gaol (*g*) or house of correction (*h*) of the county in which the prisoner was convicted. By 5 & 6 Will. 4, c. 38, s. 4, whenever any person shall be convicted at any sessions of any offence for which he or she shall be liable either to the punishment of [*penal servitude*] or imprisonment, it shall be lawful for the court, if it shall so think fit, to commit such person to any house of correction for such county in execution of the judgment; and in case of the commitment of any person sentenced to [*penal servitude*] all the powers, provisions, and authorities for removal of offenders sentenced to [*penal servitude*], given by any former Act to sheriffs or gaolers, shall be, and the same are hereby extended and given to the keepers of houses of correction in whose custody such last-mentioned offenders shall be. And now every prison to which the Prisons Act, 1865 (28 & 29 Vict. c. 126), applies, shall be deemed to be a gaol and house of correction.

Imprisonment in gaol or house of correction, when.

By 31 Car. 2, c. 2, s. 8, the custody of prisoners could not be changed either before or after trial even to a place within the same county, except by *habeas corpus* or other legal writ; but see now the provisions of the Prisons Act, 1865 (28 & 29 Vict. c. 126), ss. 64, 65.

Whenever whipping may be awarded for any indictable offence under 24 & 25 Vict. c. 96, the court may sentence the offender to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the court in the sentence (*i*); and a similar provision, enacted with respect to the Act consolidating the law relating to malicious injuries to property, is contained in 24 & 25 Vict. c. 97, s. 75; and as to offences against the person, there is a similar enactment in 24 & 25 Vict.

Whipping.

(*g*) 5 Hen. 4, c. 10.

(*h*) 5 Ann. c. 6, s. 2, at least for larceny. See *Ex parte Brounsell* (1777), 2 East's P. C. 738.

(*i*) 24 & 25 Vict. c. 96, s. 119.

c. 100, s. 70. No offender shall be whipped more than once for the same offence (*k*).

Considerations as to the inflicting of punishment.

The apportionment of punishment, which, in almost all instances cognizable at sessions, is now left to the discretion of the court, is the most important duty cast on the justices. It is scarcely necessary to observe, that it should not only be proportioned to the offence in degree, but adapted to it in kind; measured not only by the abstract enormity of the offence, but by the age, sex and circumstances of the offender. In many cases of assaults, &c. the additional requisition of security for the good behaviour of the offender, when he leaves his confinement, is proper; and especially where the evidence shows a temper likely to endanger the public peace, or habits which tend to subvert the public morals.

As to awarding imprisonment, &c. to commence at the expiration of a sentence then being undergone.

Where a party was actually in custody, under sentence of imprisonment, for one *misdemeanour*, and was afterwards tried for another like offence before the original term had expired, sentence of further imprisonment might always be given, to commence from the termination of the first (*l*); and it is now enacted (*m*), that wherever sentence shall be passed for *felony* on a person already imprisoned under sentence for *another crime*, it shall be lawful for the court to award imprisonment for the subsequent offence, to commence at the expiration of the imprisonment to which the party shall have been previously sentenced; and where such person is already under sentence, either of imprisonment or [*penal servitude*], the court, if empowered to pass sentence of [*penal servitude*], may award such sentence for the subsequent offence, to commence at the expiration of the imprisonment or [*penal servitude*] to which such person shall have been previously sentenced, although the aggregate term of imprisonment or [*penal servitude*] respectively may exceed the term for which either of those punishments could be otherwise awarded.

Fine and sureties for keeping the peace—in what cases.

By the 24 & 25 Vict. c. 96, s. 117, whenever any person shall be convicted of any indictable *misdemeanour* under that Act, the court may, if it shall think fit, in addition to, or in lieu of, any of the punishments by this Act authorized, fine the offender, and require him to enter into his own recognisances, and to find sureties, both or either, for keeping the peace and being of good behaviour.

Indictable misdemeanours against Larceny Act (24 & 25 Vict. c. 96).

And in case of any felony punishable under this Act, the court may, if it shall think fit, require the offender to enter into his own recognisances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this Act authorized.

Felonies punishable under same Act.

(*k*) 25 Vict. c. 18.

(*l*) *R. v. Wilkes* (1770), 4 Burr. 2577; *R. v. Williams* (1790), 1 Lea. 536.

(*m*) 7 & 8 Geo. 4, c. 28, s. 10.

clause for not finding sureties for any period exceeding one year.

As to indictable misdemeanours punishable under the 24 & 25 Vict. c. 97, and felonies punishable under the same Act, a similar enactment to the above is contained in sect. 73 of that Act.

So in the Act relating to coinage offences, a similar enactment is contained with respect to indictable misdemeanours and felonies punishable under that Act (*n*).

With respect to indictable misdemeanours and felonies punishable under the Act relating to offences against the person, a similar enactment is provided by 24 & 25 Vict. c. 100, s. 71.

Where a party is to receive any corporal punishment, judgment cannot be given against him in his absence (*o*). We have seen that a party charged with an offence less than felony need not be present at his trial at the quarter sessions, after he has once appeared and pleaded on that or a previous occasion (*p*). A defendant indicted for a misdemeanour may submit to a fine in his absence (*q*). In the King's Bench a *capias ad satisfaciendum domino regi pro fine* may be issued to enforce payment of a fine (*r*); and so in indictments removed there by *certiorari* (*s*). It has been said that it was doubtful at common law whether the court of quarter sessions could issue a *capias* to the sheriff for any other purpose than answering an indictment found (*t*).

Personal presence of convicted person necessary—when.

However, Lambard says (*u*), that where the conviction is for breach of the peace, riot, contempt, or other offence for which no certain fine is appointed, the judgment is that the party shall be taken (that is, if absent) to satisfy the king for his fine; and, thereupon, the *capias pro fine* may issue (*x*); and if the party cannot be found, other judicial process (viz. one *capias utlagatum* only if after judgment) (*y*) issues till he is outlawed (*z*).

But if he is brought in (continues Lambard), then is he a

(*n*) 24 & 25 Vict. c. 99, s. 38.

(*o*) *R. v. Hann* (1765), 3 Burr. 1786; *Duke's case* (1697), Salk. 400; *R. v. Templeman* (1702), *id.* 55; *R. v. Harris* (1697), Skinner, 684.

(*p*) *Ante*, p. 220; 4 Bla. Com. 375.

(*q*) *R. v. Templeman*, *sup.*; Hawk. b. 2, c. 48, s. 17, citing Salk. 56, *supra*, and Skinn. Rep. 684, *S. C.*; also Salk. 400.

(*r*) *R. v. Templeman*, *sup.*; *Duke's case*, *sup.*

(*s*) 2 Hale, 193.

(*t*) Dalton's Just. c. 193; 2 Hawk. c. 27, s. 8, citing Lambard, b. 4, c. 8, and Precedents at end of that work.

(*u*) Eiren. Chap. XVI.

(*x*) 2 Hawk. c. 27, s. 1.

(*y*) 2 Hawk. c. 27, s. 113.

(*z*) It seems from some authorities, that process of outlawry may issue from the court of quarter sessions itself. See 2 Hale, 199; 12 Co. 133; but see next page.

prisoner, and the justices of peace are then by their discretion to assess the fine, estreat it, and deliver him. "For" (adds this ancient writer) "in no case, as I take it, can they of themselves levy any fine or forfeiture due to the queen, inasmuch as not they, but the sheriff, is accountant for all such matters." The present editors submit that whatever foundation there may have been for any doubt as to the jurisdiction of the quarter sessions in this particular, there is no longer any room for doubt as to its powers since the Levy of Fines Act (3 Geo. 4, c. 46). A joint award of one fine against several defendants is erroneous; for otherwise one who had paid his part might be imprisoned till the others paid theirs (*a*).

Fines, how
levied.

Fines imposed by quarter sessions and not paid are copied on a roll by the clerk of the peace and sent to the sheriff, being his authority to levy the amount on the goods of the party in his own bailiwick (*b*), and under a later Act to obtain a like levy in another county (*c*), or to take the defendant into custody, if there are no sufficient goods in either. The sheriff returns what has been done thereon to the next sessions; which return, with the above roll, is sent by the clerk of the peace to the commissioners of the treasury. The sheriff also sends there an annual account of those on whom fines which have been sent to him to levy have been imposed, and of the causes of non-payment, if not so levied. That account is in due course transmitted to the exchequer, so as to be ready to be enforced in the usual manner at suit of the crown (*d*). The same process is applied to the estreat of forfeited recognizances (*e*).

Outlawry
after judg-
ment in mis-
demeanours.

Proceedings to outlawry are practically obsolete. Though it has been laid down that justices in sessions may issue process of outlawry on indictments found before them there, it seems the better opinion that it should issue from the court above, on the return of the record there from the quarter sessions on *certiorari* (*f*).

Fees.

The statute 55 Geo. 3, c. 50, is extended by 8 & 9 Vict. c. 114, which enacts, that the provisions of 55 Geo. 3, c. 50, respecting the discharge of certain prisoners without payment of any fee, shall extend to all persons who now are or hereafter shall be charged with or indicted for any felony, or as accessory thereto, or with or for any misdemeanour, before any court of criminal jurisdiction in England, against whom no bill of indictment shall be found by the grand jury, or who on his,

(*a*) 2 Hawk. c. 48, s. 23, p. 635; 11 Co. 42 a, *Godfrey's case*.

(*b*) 3 Geo. 4, c. 46, s. 2. See *ante*, p. 55.

(*c*) 4 Geo. 4, c. 37, s. 3.

(*d*) See the above statutes, *ante*, p. 67.

(*e*) 16 & 17 Vict. c. 30, s. 2.

(*f*) 2 Hawk. c. 27, s. 11; 5 T. R. 204. See authorities collected, 1 Chit. Cr. L. 348, 1st ed.; Bac. Ab. tit. *Outlawry* (B); and see Short & Mellor's Practice of the Crown Office.

her or their trial shall be acquitted, or who shall be discharged by proclamation for want of prosecution; and that it is not and shall not be lawful to demand or take from any such persons any fee for their appearance to the indictment or information, or for allowing them to plead thereto, or for recording their appearance or plea, or for discharging any recognizance.

The court of quarter sessions, upon the application of a member of a prisoners' aid society, may, in the manner appointed, signify their approval of the society, and upon such certificate being granted, and so long as it is in force, the society is to be deemed to be a certified prisoners' aid society; and upon the discharge of a prisoner the visiting justices may, instead of directing a sum of money to be paid by the governor of the gaol to the prisoner, direct such sum, not exceeding 2*l.*, to be paid to the treasurer of a certified prisoners' aid society on their receiving an undertaking that such sum shall be applied by the society for the benefit of the prisoner (*g*).

Aid to discharged prisoners.

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 100, it is enacted, that if any such person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid, the court before whom any person shall be tried for any such felony or misdemeanour shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner. Provided that if it shall appear before any award or order made that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery by some person or body corporate for a just and valuable consideration, without any notice or without any reasonable cause to suspect that the same had, by any felony or misdemeanour, been stolen, taken, obtained, extorted, embezzled, converted, or disposed of, in such case the court shall not award or order the restitution of such security. Provided also that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent intrusted with the possession of goods

Restitution of stolen property under the Larceny Act, 1861.

(*g*) 25 & 26 Vict. c. 44. And see the Prisons Act, 1865 (28 & 29 Vict. c. 126), s. 43.

Order for delivery to owner of property unlawfully pawned.

or documents of title to goods, for any misdemeanour against this Act.

Under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93), s. 30, if any person is convicted in any court of feloniously taking or fraudulently obtaining any goods or chattels, and it appears to the court that the same have been pawned with a pawnbroker, the court on proof of the ownership of the goods and chattels may, if it thinks fit, order the delivery thereof to the owner, either on payment to the pawnbroker of the amount of the loan, or of any part thereof, or without payment thereof, or any part thereof, as to the court according to the conduct of the owner and the other circumstances of the case seems just and fitting.

By the Prosecution of Offences Act, 1879 (42 & 43 Vict. c. 22), s. 7, it is enacted that the prosecution of an offender by the director of public prosecutions shall, for the purpose of enabling a person to obtain a restitution of property, or obtaining, exercising, or enforcing any right, claim, or advantage whatsoever, have the same effect as if such person had been bound over to prosecute and had prosecuted the offender, subject to this proviso, that such person shall give all reasonable information and assistance to the said director in relation to the prosecution.

By the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 24, it is enacted (1) where goods have been stolen, and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale or market overt or otherwise. (2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting in law to larceny, the property in such goods shall not revert in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

SECTION 14.

OF COSTS OF PROSECUTIONS AND DEFENCE.

Costs of prosecution in cases of felony, whether a bill be preferred or not.

The right to costs or expenses of a prosecutor and the witnesses in criminal cases depends upon statute.

By 7 Geo. 4, c. 64, s. 22, the court before which any person shall be prosecuted or tried for any felony is hereby authorized and required at the request of the prosecutor, or of any other person who shall appear on recognizance or subpoena to prosecute or give evidence against any person

accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution of such sums of money as shall seem reasonable and sufficient to reimburse such prosecutor and witnesses for the expenses they shall severally have incurred in attending before the examining magistrate or magistrates and the grand jury, and in otherwise carrying on such prosecution, and also to compensate them for their trouble and loss of time therein. And although no bill of indictment shall be preferred, it shall be lawful for the court, where any person shall, in the opinion of the court, *bond fide* have attended the court in obedience to any recognizance or subpœna, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient to reimburse such person for the expense which he or she shall have *bond fide* incurred by reason of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein shall be ascertained by the certificate of such magistrate or magistrates granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses and compensations shall be ascertained by the proper officers of the court, subject nevertheless to the regulations to be established in the manner thereafter mentioned.

The costs and expenses of the prosecutor in preferring the indictment do not include an attorney's bill of costs for subpœnaing a witness, or for his own (the attorney's) travelling expenses to get information in support of the charge (*h*). The court has no power to allow the expenses of witnesses attending before the coroner upon an inquiry previous to the indictment (*i*). A party who is bound over to prosecute in the Central Criminal Court, or at the Assizes by the Court of Quarter Sessions, is entitled to his expenses under the statute (*k*); and so also to the costs of the argument on behalf of a prosecutor in the Court for Crown Cases Reserved (*l*), which should be ascertained by the officer of the latter court, and be by him certified to the clerk of the peace, who will act upon such certificate (*m*).

The costs of the prosecutor and of his witnesses may be allowed where a bill is preferred, though neither the prosecutor nor his witnesses are under recognizance, and only one

Costs and expenses—what.

(*h*) *R. v. Savage and Venn*, Oxford Spring Ass. 1842, Patteson, J. Bill not found, MSS. Tyrwhitt: Dick. Q. S. 6th ed. by Talfourd, 974.

(*i*) *R. v. Rees* (1832), 5 C. & P. 302; *R. v. Taylor* (1832), *id.* 301.

(*k*) *R. v. Paine* (1834), 7 C. & P. 135.

(*l*) *R. v. Cluderoy* (1849), 3 C. & K. 205; *R. v. Lewis* (1857), 1 D. & B. 326.

(*m*) *R. v. Lewis*, *ubi sup.*

witness is subpoenaed (*n*). When the prosecutor and his witnesses were bound over to appear on a charge of felony, but, by advice of counsel, a charge of misdemeanour at common law, for which costs could not be allowed alone, was preferred, a judge made an order for the expenses of the prosecutrix and witnesses (*o*).

The real prosecutor is entitled to his costs though his name may not appear on the back of the indictment (*p*). The person bound over by the magistrates to prosecute is the person to instruct the attorney for the prosecution, so as to enable the costs of the attorney engaged to be included in the order for costs; but in such a case as burglary, the person whose house is broken into is the person really interested in the prosecution, who ought to be bound over to prosecute (*q*). If the trial be postponed, the order for costs is postponed also till after the trial (*r*). But if the accused die or becoming insane be removed to an asylum so as to render it necessary to postpone the trial indefinitely, the court will order payment of the costs (*s*).

Rewards for
activity in
apprehending
felons.

By the combined operation of 7 Geo. 4, c. 64, s. 28, and 14 & 15 Vict. c. 55, s. 8, when any person shall appear to have been active in or towards the apprehension of any person charged *inter alia* with feloniously housebreaking, or with robbery from the person, or with horse stealing, bullock stealing, *i.e.*, ox, cow, heifer, &c. (*t*), or sheep stealing, or with being accessory before the fact to any of the offences aforesaid, or with receiving any stolen property knowing the same to have been stolen, the court is hereby authorized and empowered in any of the cases aforesaid to order the sheriff of the county in which the offences shall have been committed, to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable and sufficient to compensate such person or persons for his, her or their expenses, exertions and loss of time in or towards such apprehension; provided that nothing herein contained shall prevent the said court from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses and compensation as such court may be empowered to do. Such compensation to any one person shall not exceed the sum of five

(*n*) *R. v. Butterwick* (1839), 2 Moo. & R. 196, acted upon by Lush, J., in *R. v. Haines and others*, tried at Worcester Summer Assizes, 1874.—T. S. P.

(*o*) *R. v. Hanson* (1849), 2 C. & K. 912.

(*p*) See *R. v. Sharpness* (1787), 2 T. R. 47.

(*q*) *R. v. Cook* (1858), 1 F. & F. 389; *R. v. Yates* (1857), 7 Cox, C. C. 363.

(*r*) *R. v. Hunter* (1829), 3 C. & P. 591; *Re Young* (1847), 2 Cox, C. C. 280.

(*s*) *R. v. Dwerryhouse* (1847), 2 Cox, C. C. 446.

(*t*) *R. v. Gilbrass* (1836), 7 C. & P. 444.

pounds. No fee is to be charged for making out the order for payment. These rewards are not confined to cases where the person apprehending, &c. has had an actual loss of time, or been at an actual expense (*t*).

By sect. 29 of 7 Geo. 4, c. 64, the sheriff of the county for the time being is hereby authorized and required, upon sight of such order, forthwith to pay to such person or to any one duly authorized on his or her behalf the money in such order mentioned, and every such sheriff may immediately apply for repayment of the same to the commissioners of the treasury, who, upon inspecting such order together with the acquittance of the person entitled to receive the money thereon, shall forthwith order repayment to the sheriff of the money so by him paid without any fee or reward.

The 23rd section of 7 Geo. 4, c. 64, empowering the court to grant the costs of the prosecutor and witnesses in certain cases of misdemeanour, was, when passed, wholly new. It enacts, "That where any prosecutor or other person shall appear before any court on recognizance or subpoena, to prosecute or give evidence against any person indicted of any—

assault with intent to commit felony;

attempt to commit felony;

riot;

misdemeanour for receiving any stolen property, knowing the same to have been stolen;

assault upon a peace officer in the execution of his duty, or upon any person acting in aid of such officer;

neglect or breach of duty as a peace officer;

assault committed in pursuance of any conspiracy to raise the rate of wages;

knowingly and designedly obtaining any property by false pretences (*u*);

wilful and indecent exposure of the person (*x*);

wilful and corrupt perjury, or of subornation of perjury;

every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the court, where

(*t*) *R. v. Barnes* (1835), 7 C. & P. 166.

(*u*) An indictment on 8 & 9 Vict. c. 109, s. 17, for fraudulently winning money at cards, with intent to cheat, is within this provision: *R. v. Gardner* (1851), 5 Cox, C. C. 140.

(*x*) This does not apply where the exposure is charged as done wilfully, &c. (without adding *publicly*) with a view to incite another man to commit with the defendant an unnatural crime: *R. v. —* (1838), 8 A. & E. 589.

any person shall have *bonâ fide* attended the court in obedience to any recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony.

All the provisions of 7 Geo. 4, c. 64, s. 23, and of any other Act concerning or applicable to the payment of such costs, expenses and compensation in cases of the said misdemeanours, shall be applicable to the cases *inter alia* of—

unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother or any other person having the lawful care or charge of her;

conspiring to charge any person with any felony, or to indict any person of any felony, and of conspiring to commit any felony (y).

Where an indictment for a misdemeanour is removed by *certiorari*, and tried at *nisi prius*, the prosecutor and witnesses are not entitled to costs under this statute (z).

Neglect of master, &c. to provide apprentices or servants with necessary food, &c.

And now it is provided that, where any complaint shall be made of neglect by a master or mistress to provide apprentices or servants with necessary food, clothing or lodging, and in cases of bodily harm done by them to any such apprentices or servants, so that the life shall be endangered or health be permanently injured, contrary to the twenty-sixth section of 24 & 25 Vict. c. 100, or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount, in point of law, to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony; and two justices of the peace before whom such complaint is heard shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or place, or where there are no guardians, by the overseers of the poor of the place in which the offence shall be charged to have been committed, such guardians or overseers, as the case may be, upon personal service of such certificate, or a duplicate thereof, upon the clerk of such guardians, or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of any court), out of the common fund of the union, or out of the funds in the hands of the guardians or overseers,

Prosecution by guardians of the poor.

Costs to be paid out of common fund of union.

(y) 14 & 15 Vict. c. 55, s. 2.
(z) *R. v. Johnson* (1827), 1 Moo. C. C. 173. See *R. v. Richards* (1828), 8 B. & C. 420; *R. v. Jeyes* (1835), 3 A. & E. 416; *R. v. Kelsey* (1832), 1 Dowl. P. C. 481.

as the case may be; and where there is a board of guardians, the clerk or some other officer of the union or place, and where there is no board of guardians, one of the overseers of the poor may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute (a). And as to adjudging the person convicted to pay the costs of a conviction for assault, see sect. 74.

The court, before which any indictable misdemeanour against 24 & 25 Vict. c. 96 (the Larceny Act, 1861), shall be prosecuted or tried, may allow the costs of the prosecution, as in cases of felony, and every order for the payment of such costs shall be made out, and the sum of money mentioned therein paid and repaid, upon the same terms and in the same manner in all respects as in cases of felony (b). A corresponding section in identical language is to be found in the Malicious Injuries to Property Act (24 & 25 Vict. c. 97), s. 77, and, again, in the Forgery Act (24 & 25 Vict. c. 98), s. 54, and in the Act relating to Offences Against the Person (24 & 25 Vict. c. 100), s. 77.

Under
Larceny Act.

Malicious
Injuries to
Property Act.

Forgery Act.

Offences
Against the
Person Act.

Bankruptcy
offences.

By sect. 17 of the Debtors Act, 1869, where the prosecution of a bankrupt is ordered by the court, then, on the production of the order of the court, the expenses of the prosecution shall be allowed, paid and borne as expenses of prosecutions for felony are allowed, paid and borne (c).

The manner in which orders granted by the court under these provisions are to be made out is regulated by 7 Geo. 4, c. 64, which enacts, by sect. 24, "That every order for payment to any prosecutor, or other person as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such prosecutor or other person, upon being paid for the same the sum of 1s. for the prosecutor, and 6d. for each other person, and no more; and, except in the cases hereinafter provided for, shall be made upon the treasurer of the county, riding or division in which the offence shall have been committed, or shall be supposed to have been committed, who is hereby authorized and required, upon sight of every such order, forthwith to pay to the person named therein, or to any one duly authorized to receive the same on his or her behalf, the money in such order mentioned, and shall be allowed the same in his accounts."

Orders for
costs—how
made out.

(a) 24 & 25 Vict. c. 100, s. 73.

(b) *Ibid.* c. 96, s. 121.

(c) In *Re Stanlake & Son, Ex parte Priestley* (1878), 10 Ch. D. 774, an order to prosecute a bankrupt had been refused by the county-court judge. The trustee in bankruptcy nevertheless prosecuted the bankrupt and convicted him, and then appealed from the judge's refusal to order the prosecution; and on appeal the order of the county-court judge was discharged, and an order directing the prosecution *nunc pro tunc* was made. In the absence of an order of court directing the prosecution, the costs of prosecuting bankrupts under this Act cannot be allowed. *R. v. Thomas* (1870), 22 L. T. R. 138.

Service of
order for costs
on county
treasurer.

Remedy
against
county trea-
surer for dis-
obeying order
for costs.

Costs payable
by prosecutor
in felonies
under Vexa-
tious Indict-
ments Act.

In boroughs.

The *entire* order of a court for paying the costs of a prosecution (*d*) must be served on the county treasurer. Thus, where the attorney had torn off that part of the order which contained the detail, the treasurer was justified in refusing to pay, though that part of the same sheet of paper which ordered the payment of an *aggregate sum* was shown him (*e*).

Where a treasurer on whom an order had been made to pay the expenses of a prosecution for a riot (being a misdemeanour within 7 Geo. 4, c. 64, s. 23) refused to do so on the ground that the party, though bound over to prosecute at the *sessions*, yet obtained circuit subpoenas for the witnesses, and preferred his bill at the assizes: it was held that a *mandamus* would not lie to compel him, and that the remedy was by indictment for disobeying the order (*f*). In the same case, it was doubted whether the expenses of a prosecutor can be awarded under that section, unless he has been bound over to prosecute; but it was held, that witnesses attending at assizes on subpoena were clearly entitled to theirs (*g*).

A prisoner convicted of felony may be condemned to the payment of the whole or any part of the costs of a prosecutor (*h*); and whenever any bill of indictment shall be preferred to a grand jury under 22 & 23 Vict. c. 17, against any person who has not been committed to or detained in custody or bound by recognizance to answer such indictment, and the person accused thereby shall be acquitted thereon, it shall be lawful for the court, before which such indictment shall be tried, in its discretion to order and direct the prosecutor or other person by or at whose instance such indictment shall have been preferred, to pay to the accused person the just and reasonable costs, charges and expenses of such accused person and his witnesses, if any, caused and occasioned by or consequent upon the preferring of such bill of indictment, to be taxed by the proper officer of the court, and upon non-payment of such costs, &c. within one calendar month after the date of such direction or order, it shall be lawful for any of the superior courts at Westminster to issue such process as may be issued to enforce judgments (*i*).

Where offences are committed in jurisdictions which do not contribute to the county rate, they are, by 7 Geo. 4, c. 64, s. 25,

(*d*) 7 Geo. 4, c. 64, s. 24.

(*e*) *R. v. Jones* (1840), 9 C. & P. 405.

(*f*) *R. v. Jeyes* (1835), 3 A. & E. 416; *R. v. Treasurer of Surrey* (1819), 1 Chitt. 650. See as to *mandamus* lying, *R. v. Bristow* (1795), 6 T. R. 168; *R. v. Dean (Commissioners of)* (1813), 2 M. & S. 80; *R. v. Severn and Wye Rail. Co.* (1819), 2 B. & Ald. 646; *R. v. Clark* (1844), 5 Q. B. 887.

(*g*) But see as to this, *R. v. Butterwick* (1839), 2 Moo. & R. 196.

(*h*) 33 & 34 Vict. c. 23, s. 3; *ante*, p. 364.

(*i*) 30 & 31 Vict. c. 35, s. 2.

made payable either out of the local fund applicable to the purposes of the county rate ; or, if there be no such fund, out of the poor rates. In the former case the order is to be directed to the treasurer of the fund ; in the latter, to the parish officers.

Sums ordered to be paid under the above enactment in respect of offences committed in a borough in which a court of separate quarter session is holden are paid out of the borough fund (*k*).

For the regulation of the rate of allowance, it is enacted by 14 & 15 Vict. c. 55, s. 5, that it shall be lawful for one of the principal secretaries of state to make regulations as to the rate or scales of payment of all or any costs, expenses and compensations to be allowed or ordered to be paid under 7 Geo. 4, c. 64, or any other Act, or this Act, to prosecutors and witnesses, and to persons attending the court in obedience to any recognizance or subpoena in cases of criminal prosecutions, and, except as hereinafter mentioned, to persons who have been active in or towards the apprehension of persons charged with offences ; and also regulations as to the scales or rates of payment according to which certificates may be granted by the examining magistrate or magistrates in respect of the expenses of any prosecutor or witness or witnesses for the prosecution, or other person, of attending before such magistrate or magistrates, and of any compensation for trouble and loss of time therein in any case where any court or judge is empowered, under the said Act of 7 Geo. 4, or any other Act, or this Act, to order payment of such expenses or compensation, and concerning the forms of such certificates and the details or particulars to be inserted therein, of the expenses, trouble and loss of time to which such certificates relate. And it shall be lawful for one of the principal secretaries of state from time to time to alter such regulations, or make new regulations in relation to any of the matters aforesaid, and such regulations, for the time being, shall be binding on all courts and persons whomsoever.

Rate or scales
of payment of
costs.

By 14 & 15 Vict. c. 55, s. 6, where any such order is made under the 7 Geo. 4, c. 64, or any other Act, or this Act, the amount of such costs, expenses or compensation shall be ascertained by the proper officer of the court, according to the regulations made under this Act. And when the expenses and compensation in respect of attending before any examining magistrate or magistrates are so ordered to be paid, such expenses and compensation shall also be ascertained by the proper officer of the court, according to such regulations ; but the amount thereof, as so ascertained, shall not exceed the amount mentioned in the certificate of the examining magistrate or magistrates ; and, save as aforesaid, the certificate of

(*k*) 45 & 46 Vict. c. 50, s. 169.

any examining magistrate or magistrates shall not be conclusive as to the amount to be allowed for expenses of attendance before him or them, or for compensation for trouble or loss of time therein.

By the same Act, sect. 7 provides that nothing in that Act, or any of the regulations under that Act, shall interfere with or affect the power of any court to order payment to any person who shall appear to such court to have shown extraordinary courage, diligence or exertion, in or towards any such apprehension as hereinbefore mentioned of such sum as such court shall think reasonable and adjudge to be paid in respect of such extraordinary courage, diligence or exertion.

Costs of witnesses for the accused.

It is provided by 30 & 31 Vict. c. 35, s. 5, that the court before which any accused person shall be prosecuted or tried, or for trial before which he may be committed or bailed to appear for any felony or misdemeanour, is hereby authorized and empowered, in its discretion, at the request of any person who shall appear before such court on recognizance to give evidence on behalf of the person accused, to order payment unto such witness so appearing, such sum of money as to the court shall seem reasonable and sufficient to compensate such witness for the expenses, trouble and loss of time he shall have incurred or sustained in attending before the examining magistrate, and at or before such court, and the amount of such expenses of attending before the examining magistrate, and compensation for trouble and loss of time therein, shall be ascertained by the certificate of such magistrate, granted before the attendance in court, and the amount of all other expenses and compensation shall be ascertained by the proper officer of the court, who shall, upon receipt of the sum of sixpence for each witness, make out and deliver to the person entitled an order for such expenses and compensation, together with the said fee of sixpence upon such and the same treasurers and officers as would now by law be liable to payment of an order for the expenses of the prosecutor or witnesses against such accused person; and if the accusation be of such kind that the court shall have no power to order the expenses of the prosecutor, then upon the treasurer or other officer in the capacity of a treasurer of the county, riding, division, city, borough or place where the offence of such accused person may be alleged to have been committed, which treasurer or other officer is hereby required to pay the same orders upon sight thereof, and shall be allowed the same in his accounts: provided always, that in no case shall any such allowances or compensation exceed the amount now by law permitted to be made to prosecutors and witnesses for the prosecution; and provided always, that such allowances and compensation shall be allowed and paid as part of the expenses of the prosecution (1).

(1) 30 & 31 Vict. c. 35, s. 5.

The fee of sixpence for the order for the witnesses' expenses is abolished when the officer of the court is paid by salary, or is allowed, by the table of fees relating to his office, one fee only of a fixed amount in respect of his duties relating to a prosecution of an offender (*m*).

A table showing the costs usually allowed to a solicitor for the conduct of a prosecution will be found in Appendix B.

(*m*) 32 & 33 Vict. c. 89, s. 10.

CHAPTER VII.

OF PROCEEDINGS AFTER JUDGMENT BY WAY OF APPEAL—OF
CASES RESERVED—OF WRIT OF ERROR—OF CERTIORARI.

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SECTION 1.

WRITS OF ERROR.

No new trial
in felonies.

No new trial can be granted in cases of felony on the merits as in civil causes for the purpose of impeaching the verdict, *e.g.* by reason of its being against the weight of evidence, or on account of the misreception or rejection of evidence, or by reason of there being no sufficient evidence to be left to the jury; but a writ of *venire de novo* may be awarded by the Court of King's Bench on a writ of error, or the verdict be quashed by the sessions and a fresh trial ordered at the next sessions, in case of a mistrial, on a ground impeaching the due constitution of the court before which the trial took place, or the regularity of the proceedings there, as on the ground of a defect in the jury process; or a mistake in the swearing of the jury, such as swearing one of them in a wrong name, whereby the prisoner lost the opportunity of his challenge (*a*), or swearing one not on the panel (*b*).

A writ of
venire de novo
may be
awarded
either by
King's Bench
or quarter
sessions for a
mistrial.

When it lies.

A writ of error lies after judgment to reverse it for a defect in its proceedings, or after outlawry to reverse such outlawry.

With reference to writs of error to reverse a judgment on an indictment, formerly, if the indictment contained several counts, some of them good and some or one of them bad, and judgment passed generally, the judgment must have been reversed, because the court of error had no power to pronounce the proper judgment in such a case, or to remit the case for judgment to the court below; but now, by the 11 & 12 Vict.

(*a*) *R. v. Mellor* (1858), 27 L. J. M. C. 121, where the judges were evenly divided on this point.

(*b*) *Norman v. Beaumont* (1744), Willes, 484.

c. 78, s. 5, should the court below have pronounced judgment generally, the court of error may now order judgment to be arrested on the bad counts and pronounce the proper judgment on all the good counts; or the court of error in such a case may remit the record to the court below to pronounce the proper judgment, which, in such a case, would be to arrest the judgment on the bad counts and pass sentence on the good counts (c).

Where there is an issue on which there is an imperfect finding in the case of a misdemeanour, or none at all as to part, the course is to award a *venire de novo* as to that if it be demanded, but whether this can be done in a case of felony is doubtful; but the finding on the issue on one count of an indictment is not vitiated or affected by an omission to find on the issue on another count or by reason of imperfect findings on such other count (d).

But a distinction is to be noted between the grounds which will justify the award of a *venire de novo* on a motion in arrest of judgment, and those which will justify the award of a *venire de novo* after judgment. Misconduct in a juror who, after the jury had retired to consider their verdict, and before verdict, separated from the rest of the jurors and conversed with a stranger concerning the verdict to be given (e), or other misconduct of jurors, will justify a *venire de novo* before judgment, but not after (f). So there could have been no *venire de novo* at common law after judgment on account of irregular conduct of the presiding judge in reading over to a jury notes of evidence taken upon a former trial (g), or on the ground of misdirection (h). A *venire de novo* was granted by the Court for Consideration of Crown Cases Reserved on the ground of the chairman having improperly refused to receive a lawful verdict and having forced the jury to return a different verdict (h). But this was under the statute.

“The cases in which a verdict upon a charge of felony has been held to be a nullity and a *venire de novo* awarded have not been classified in the digests; there are cases of defect of jurisdiction in respect of time, place or person, cases of verdicts so insufficiently expressed, or so ambiguous, that judgment could not be founded thereon; but we have not discovered any valid authority for holding a verdict of conviction or acquittal in a case of felony, delivered by a competent jury

(c) *R. v. Holloway* (1851), 2 Den. C. C. 295.

(d) See *Latham v. R.* (1864), 33 L. J. M. C. 197; *R. v. Hayes* (1727), 2 Ld. Raym. 1518. Where there has been a jurymen sworn in a wrong name, see *R. v. Mellor* (1858), 27 L. J. M. C. 121; *ante*, p. 242, “Swearing of Jury.”

(e) *R. v. Fowler* (1821), 4 B. & A. 273.

(f) *R. v. Murphy* (1869), L. R. 2 P. C. 535; *R. v. Bertrand* (1867), L. R. 1 P. C. 520.

(g) *R. v. Bertrand*, *ubi sup.*

(h) *R. v. Yeadon* (1861), 31 L. J. M. C. 70.

before a competent tribunal in due form of law, to be a nullity by reason of some conduct on the part of the jury which the court considers unsatisfactory" (i).

Fiat of attorney-general to be obtained

The procedure in error is now regulated by the Crown Office Rules of 1886. Rule 183 provides that error upon a judgment shall lie to the King's Bench Division. Rule 184 that no writ of error shall lie without the fiat of the attorney-general having first been obtained, and to obtain this a copy of the judgment should be sent to the attorney-general, together with counsel's certificate that there is an error in the record. By Rule 190, the plaintiff in error remains in custody until the decision of the court upon the writ; but by Rule 199, in misdemeanour where a writ of error has been brought by the defendant, and not by the attorney-general, the defendant on the indictment on obtaining his writ of error shall have the execution of the judgment stayed, and receive back the amount of the fine levied upon him upon the judgment, and further, if in custody shall be entitled to be discharged from imprisonment on entering into a recognizance with two sufficient sureties to prosecute the writ of error in Form No. 127 in the Appendix to the Crown Office Rules, 1886, before a judge of the High Court or a justice of the peace of the county, borough or place where the defendant may be in custody. By Rule 200, every such recognizance shall be filed at the Crown Office, and the master of the Crown Office shall make out and deliver a certificate sealed with the seal of the office that such recognizance is duly filed of record, which certificate shall be a sufficient warrant to the gaoler having the custody of the plaintiff in error to discharge him out of custody, and for the repayment of any fine that may have been imposed by the court by the person having in his possession the whole or any part of the fine levied in execution of such judgment.

in misdemeanour;
bail in error.

Recognizance.

By Rule 201, if the plaintiff shall make default in prosecuting the writ of error with effect, or in any other way break the conditions of his recognizance, the court may estreat the recognizance in a summary way, and order the writ of error to be quashed without any argument thereon, and in every such case the plaintiff in error shall be liable to execution upon the judgment. If on the hearing the judgment of the court below is reversed, it shall be competent for the court of error either to pronounce the proper judgment or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment (k). If the judgment is affirmed, and the plaintiff re-committed to serve his original sentence, Rule 205 provides that "the imprisonment (if imprisonment shall not have commenced

Procedure on judgment.

(i) Privy Council, in *R. v. Murphy* (1869), L. R. 2 P. C. 548.

(k) 11 & 12 Vict. c. 78, s. 5.

under such [original] execution) shall be reckoned to begin from the day when such plaintiff in error shall be in actual custody in the prison in which he may have been adjudged to be imprisoned under such judgment; and if the plaintiff in error shall have been discharged from imprisonment on giving bail in error, such plaintiff in error shall be imprisoned for such further period in the same prison as with the time during which such plaintiff in error may already have been imprisoned under such execution shall be equal to the period for which he was adjudged to be imprisoned as aforesaid."

By Rule 203, whenever the judgment against the plaintiff in error shall have been for the payment of a fine and imprisonment until such fine be paid, either with or without imprisonment for a certain time, and the payment shall have been made and, under the provisions of Rule 200 (*ante*), repaid to the plaintiff, and the judgment upon writ of error brought shall be affirmed, the plaintiff in error shall not be entitled by reason of such payment as aforesaid to be discharged from imprisonment, notwithstanding the expiration of any certain time of imprisonment for which the original judgment shall have been given, until the fine shall be again paid.

SECTION 2.

CASE RESERVED FOR THE COURT FOR CROWN CASES RESERVED.

In the place of the old proceeding of the judges who met at the house of the Lord Chief Justice or at Serjeants' Inn, to consider any cases referred to them, upon which convictions had taken place on the circuit, with a view of recommending a pardon, if any of them were in their opinion wrong, a tribunal has been constituted by the legislature, to which judges, recorders, and chairmen of quarter sessions may refer after conviction any questions of law which have arisen on the trial, and this tribunal is commonly called the Court for Crown Cases Reserved, and is empowered to affirm or quash or amend the conviction, or make such order thereon as justice may require.

This court consists of not less than five judges of the High Court of Justice, presided over by the Lord Chief Justice of England, unless he is prevented by illness or otherwise from being present (*l*). They sit under the powers conferred by

Constitution
of the court.

(*l*) 11 & 12 Vict. c. 78, s. 3; 36 & 37 Vict. c. 66, s. 47; 44 & 45 Vict. c. 68, s. 15.

Execution may be respited or judgment postponed. Prisoner may be committed to prison or bailed.

Who may reserve question.

What questions to be reserved.

11 & 12 Vict. c. 78, which, by sect. 1, enacts, "that when any person shall have been convicted of any treason, felony or misdemeanor before any court of oyer and terminer or gaol delivery or court of quarter sessions, the judge, commissioner, or justices of the peace, before whom the case shall have been tried, may in his or their discretion reserve any question of law which shall have arisen on the trial for the consideration of the justices of either bench and barons of the exchequer, and thereupon shall have authority to respite execution of the judgment on such conviction or postpone the judgment until such question shall have been considered and decided as he or they may think fit; and in either case the court in its discretion shall commit the person convicted to prison or shall take a recognizance of bail with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be."

A recorder of a borough within the Municipal Corporations Act is within the above section (*m*), and so is a court sitting under a special commission at the Old Bailey (*n*).

The statute only gives jurisdiction to this court where there has been a conviction by a jury, and consequently this court cannot review a judgment given upon demurrer (*o*), nor entertain a case stated where a prisoner has pleaded guilty (*p*); but objections for defects on the face of the indictment which might be the subject of demurrer, but are not made so, may also be taken in arrest of judgment after verdict if not cured by verdict, and the judgment of the court, on such motion in arrest of judgment, may be reserved by the court (*q*); as where a count in an indictment for receiving stolen goods failed to allege a scienter (*r*); or where the count of an indictment on which the conviction took place showed on its face the offence to have been committed out of the jurisdiction of the court (*s*); or where the count of an indictment against a receiver upon which the conviction took place contained the words "goods stolen as aforesaid," thereby incorporating the first count alleging the stealing; and the court, in order to prevent a repugnancy, construed the words after verdict on a case reserved upon the point raised in arrest of judgment as "goods stolen" (*t*).

(*m*) *R. v. Masters* (1848), 18 L. J. M. C. 2.

(*n*) *R. v. Bernard* (1858), 1 F. & F. 240.

(*o*) *R. v. Faderman* (1850), 19 L. J. M. C. 147.

(*p*) *R. v. Clark* (1866), L. R. 1 C. C. 54.

(*q*) *R. v. Webb* (1848), 18 L. J. M. C. 39; *R. v. Ryland* (1867), L. R. 1 C. C. R. 99.

(*r*) *R. v. Larkin* (1854), 23 L. J. M. C. 125.

(*s*) *R. v. Martin* (1849), 18 L. J. M. C. 137.

(*t*) *R. v. Craddock* (1850), 20 L. J. M. C. 31; *R. v. Huntly* (1860), 29 L. J. M. C. 70.

It is doubtful whether a fact which has occurred during the trial, *e.g.*, the calling and swearing of a jurymen in a wrong name, which is not discovered till the following day, can be made the subject of a case to this court (*u*); and it is also doubtful whether a question as to whether the depositions of an absent witness were properly allowed to be sent before the grand jury to enable them to find a bill can be reserved for this court (*x*).

The question reserved must arise on the trial.

The proper course to adopt to raise a question touching the direction to a jury is for the chairman or recorder to direct the jury on any doubtful point of law, and take a general verdict from them on such direction, and take the opinion of the court as to whether such direction was right, and not to put questions to the jury and record the verdict upon their answers (*y*). The question whether the prisoner has been tried within the proper jurisdiction may be reserved (*z*). As a general rule, if a jury find a direct verdict, what they may afterwards add is not to affect their finding; as where, on a charge of stealing and receiving, the verdict was not guilty of stealing the watch, but guilty of keeping possession of it, in the hope of reward from the time he first had the watch, it was held to be a verdict of not guilty (*a*). So, on an indictment for keeping a lottery, a verdict of guilty, with a recommendation to mercy on the ground that perhaps he did not know that he was acting contrary to law, was held a verdict of guilty (*b*); and, in general, what a jury may say in recommending a prisoner to mercy is not a matter for reserving a case for this court (*c*); but the language used by the jury must be construed, by looking at the circumstances under which the verdict was returned (*d*). Where an indictment is amended at the trial, this court can only consider it in its amended form (*e*).

The chairman or recorder having determined to reserve a case, it is their duty to state the case, and transmit it, when stated, to the Master of the Crown Office, the Royal Courts of Justice, as soon as conveniently may be, and not later than four days at least before the day appointed for the sitting of the court.

Time for transmitting the case.

The 2nd section of 11 & 12 Vict. c. 78, enacts, that "the judge or commissioner or court of quarter sessions shall thereupon (*i.e.*, on having reserved the question of law for the

(*u*) *R. v. Mellor* (1858), 27 L. J. M. C. 121.

(*x*) *R. v. Clements* (1851), 2 Den. C. C. 251.

(*y*) *R. v. Sleep* (1861), L. & C. 47, *per* Pollock, C. B.

(*z*) *R. v. Stanbury* (1862), 31 L. J. M. C. 88.

(*a*) *R. v. York* (1848), 1 Den. C. C. 335.

(*b*) *R. v. Crawshaw* (1860), Bell, C. C. 303.

(*c*) *R. v. Trebilecock* (1858), D. & B. 460.

(*d*) *R. v. Sparrow* (1860), Bell, C. C. 298.

(*e*) *R. v. Webster* (1861), L. & C. 77; *R. v. Pritchard* (1861), 30 L. J. M. C. 169; *R. v. Barnes* (1866), L. R. 1 C. C. R. 45.

court) state in a case, signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said [*High Court of Justice*]."

By 11 & 12 Vict. c. 78, s. 4, the court, when a case has been reserved for their opinion, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it has been amended.

The court will not, however, send back the case upon the motion of counsel before the argument, but will wait to see whether upon the argument it becomes necessary so to do, *e.g.*, for the purpose of having omitted facts or evidence inserted (*f*); but then it will not be sent back to have facts inserted, in order to raise a purely technical objection beside the merits (*g*). It is always well, even in cases where it is not absolutely required by the rule, to set forth a copy of the indictment. But it seems to be a proper course for counsel, if, on perusing the case, it appears that a point reserved at the trial has been omitted, to communicate with the judge who reserved the case, who will doubtless insert it if requisite (*h*).

Counsel cannot appear to argue in this court upon the brief delivered at the trial, but must have fresh briefs delivered, though the court will hear as *amicus curiæ* the counsel for the prisoner who appeared for him on his trial.

Counsel, on the argument, cannot travel out of the case as stated, either as to the facts (*i*) or as to the questions of law (*k*).

Counsel for the prisoner begins on the argument, and has a reply.

Counsel will be heard for the crown, though no counsel appear for the prisoner.

The court of quarter sessions has power to order the payment of the costs of the argument on the part of the crown as part of the costs of the prosecution in cases where they have power over the costs (*l*); and the convenient practice is for the officer of the court to tax and ascertain such costs, and certify the amount to the clerk of the peace or the officer of the court below, who will act upon it (*m*).

Costs of the
case and
argument.

(*f*) *R. v. Hilton* (1858), 28 L. J. M. C. 28.

(*g*) *R. v. Brummitt* (1861), L. & C. 9.

(*h*) *R. v. Smith* (1849), 1 Den. C. C. 512, *per* Wilde, C. J.

(*i*) *R. v. Smith*, *sup.*

(*k*) *R. v. Blakemore* (1852), 21 L. J. M. C. 60.

(*l*) *R. v. Cluderoz* (1849), 3 C. & K. 205.

(*m*) *R. v. Lewis* (1857), 1 D. & B. 326.

11 & 12 Vict. c. 78, s. 2, enacts, "that the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon to reverse, affirm or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or avoid such judgment, or to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment, or order judgment to be given thereon at some other sessions of oyer and terminer or gaol delivery or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such order as justice may require."

Jurisdiction of the court over the judgment below.

Power of court to reverse, amend, arrest or affirm the judgment.

A table of all criminal offences triable at quarter sessions will be found *post*, in Appendix A.

PART II.



CHAPTER I.

OF THE ORIGINAL JURISDICTION OF THE SESSIONS IN PENAL
AND CIVIL MATTERS.

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SECTION 1.

OF THE ORIGINAL JURISDICTION OF THE SESSIONS
IN CIVIL MATTERS GENERALLY.

WE come now to that part of the business of the sessions, which is entirely submitted to the judgment of the court, without the intervention of a jury; and which, as opposed to the criminal trials, may be termed the civil jurisdiction of the court of quarter sessions.

The far greater part of the civil business of the sessions comes before the justices as a *court of appeal* deriving authority from various statutes. But the sessions have in some matters an original jurisdiction, which will be shortly considered in this chapter.

In general, the sessions have an original jurisdiction to do whatever may be done by two magistrates; except where the statute, empowering the latter to act, gives an appeal to the sessions (*a*).

The cases in which the sessions most usually exercise an original jurisdiction are in cases of apprenticeship; in the allowance of articles of the peace; and in the disposal of

(*a*) *Per Holt, C. J., R. v. Boghton (Inh.)* (1698), 1 *Ld. Raym.* 426. Thus they cannot make an original order of removal: *R. v. Bond* (1686), 2 *Show.* 487 (813 in ed. 1836, by Butt).

incorrigible rogues (*b*) committed to the general or quarter sessions for punishment. The granting of licenses for keeping houses for the sale of intoxicating liquors by the county licensing committee of the quarter sessions is an anomalous proceeding, which will be treated of under *tit.* "Licensing of Houses for the Sale of Intoxicating Liquors," *post*, Part III.

SECTION 2.

OF THE JURISDICTION OF THE SESSIONS IN CASES OF APPRENTICESHIP.

Ill-treatment
and miscon-
duct of
apprentices.

By 5 Eliz. c. 4, entitled "An Acte towching dyvers orders for artificers, laborers, servantes of husbandrye and apprentices," numerous regulations were enacted concerning apprentices, including provisions for compulsory apprenticeship, and extensive powers of enforcing the Act were conferred upon justices of the peace. This jurisdiction was originally exercised in session. The practice, however, of exercising original jurisdiction in such matters has fallen into disuse, and it is open to grave doubt whether the quarter sessions have now any jurisdiction except upon appeal. With the appellate jurisdiction we are not now concerned, but as it is not clear that the original jurisdiction has been altogether abolished, the following short account of it may not be considered out of place. The statute 5 Eliz. c. 4 was the foundation of the jurisdiction of justices of the peace to entertain questions between masters and apprentices. The only section now material to be referred to is sect. 28, which enacted as follows: "If any such master shall misuse or evil intreat his apprentice, or the said apprentice shall have any just cause to complain, or the apprentice do not his duty to his master, then the said master or apprentice being aggrieved, and having cause to complain, shall repair unto one justice of the peace within the said county, or to the mayor, or other head officer of the city, town corporate, market town, or other place where the said master dwelleth, who shall by his wisdom and discretion make such order and direction between the said master and his apprentice as the equity of the case shall require; and if for want of good conformity in the said master, the said justice of the peace, or the said mayor, or other head officer, cannot compound and agree the matter between him and his apprentice, then the said justice, or the said mayor,

(*b*) Formerly the quarter sessions had original jurisdiction in matters relating to orders for the maintenance of bastardy, but their jurisdiction in that matter has been made appellate.

or other head officer, shall take bond of the said master to appear at the next sessions then to be holden in the said county, or within the said city, town corporate, or market town, to be before the justices of the said county, or the mayor, or head officer of the said town corporate, or market town, if the said master dwell within any such; and upon his appearance, and hearing of the matter before the said justices, or the said mayor, or other head officer, if it be thought meet unto them to discharge the said apprentice of his apprenticeship, then the said justices, or four of them at the least, whereof one to be of the quorum, or the said mayor, or other head officer, with the assent of three other of his brethren, or men of best reputation within the said city, town corporate, or market town, shall have power by authority hereof, in writing under their hands and seals, to pronounce and declare, that they have discharged the said apprentice of his apprenticeship; and the cause thereof and the said writing so being made and enrolled by the clerk of the peace and town clerk amongst the records that he keepeth, shall be a sufficient discharge for the said apprentice against his master, his executors, and administrators, the indenture of the said apprenticeship, or any law or custom to the contrary notwithstanding. And if the default shall be found to be in the apprentice, then the said justices, or the said mayor, or other head officer, with the assistance aforesaid, shall cause such due correction and punishment to be ministered unto him as by their wisdom and discretion shall be thought meet."

The statute contained (sects. 33 and 36) savings of the liberties of the cities of London and Norwich and of the town of Godalming. It remained in force until 1814, when it was repealed by 54 Geo. 3, c. 96, s. 2, so far as it contained provisions respecting (a) the qualifications of persons entitled to take and become apprentices; (b) the term of years for which such apprentices should be bound; (c) the mode of binding such apprentices; (d) the penalties for taking apprentices contrary to the Act.

By sect. 3, "any justice or justices of the peace may hear and determine any complaints that may arise respecting any apprenticeships in like manner as if they had been made under the Act hereby repealed."

Sect. 4 saves the privileges of the city of London respecting apprentices and also the ancient customs and franchises of any city, town, corporation or company lawfully constituted.

The statute 5 Eliz. c. 4 has now been wholly repealed by 38 & 39 Vict. c. 86, s. 17, but nevertheless the statute 54 Geo. 3, c. 96, s. 3, still remains in force.

It is upon these statutes that the doubt as to the survival of the original jurisdiction arises. The entire repeal of the statute 5 Eliz. c. 4, which was the foundation of that jurisdiction, by 38 & 39 Vict. c. 86, s. 17, would seem to do away altogether with such original jurisdiction. But, on the other hand, the

existence of 54 Geo. 3, c. 96, s. 3, unrepealed, would seem to show that the justices still retain some original jurisdiction, and if they retain any such original jurisdiction it must be the jurisdiction to discharge apprentices under sect. 28 of 5 Eliz. c. 4, for there would not seem to be any other jurisdiction to satisfy 54 Geo. 3, c. 96, s. 3.

In *East v. Pell* (c), it was decided that upon discharging an apprentice the quarter sessions had no power to order any restitution by the master to the apprentice of any premium which may have been paid, or to absolve the apprentice from payment of any part of the premium remaining unpaid, and in this case Alderson, B., expressed the opinion that the power of the justices to discharge apprentices was confined to cases of compulsory apprenticeship under the 5 Eliz. c. 4.

By the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), jurisdiction is given to courts of summary jurisdiction to rescind the indentures of apprentices where either no premium was paid, or where the premium if paid did not exceed 25*l.*, or in the case of parish apprentices. The Act, however, only applies to apprentices to the business of a workman as defined by that Act (d).

In this state of things the Editors venture to submit the following conclusions:—

- (1.) If the view expressed by Alderson, B., in *East v. Pell* is sound, the original jurisdiction of the justices in sessions disappeared when compulsory apprenticeship under 5 Eliz. c. 4 was abolished.
- (2.) If Mr. Baron Alderson's view should be held not to be sound, the only original jurisdiction exerciseable by quarter sessions is "to discharge apprentices of their apprenticeship" and to declare the cause of such discharge. They have no power to inflict any punishment, or to order restitution of premium, or to release the apprentice from any liability to pay a premium.
- (3.) That in cases falling under the Employers and Workmen Act, 1875, courts of summary jurisdiction are armed with more ample powers, and are better able than quarter sessions to do justice.
- (4.) That in view of the repeal of the statute 5 Eliz. c. 4 by 38 & 39 Vict. c. 86, s. 17, and of the length of time during which the original jurisdiction has remained dormant, courts of quarter session would be well advised to decline to act except under the direction of the High Court of Justice.

(c) (1839), 8 L. J. M. C. 33.

(d) As to apprentices to the sea service, see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 168.

The undermentioned cases were decided before the repeal of 5 Eliz. c. 4 by 38 & 39 Vict. c. 86, s. 17.

The sessions have jurisdiction to act without any application previously made to a magistrate (*e*). It must appear on the face of the order that the master appeared (*f*), or was summoned (*g*). Their jurisdiction extends not only to apprentices bound to the trades enumerated in the statute, but to apprentices in all other trades (*h*); but, as it would seem, is restricted to compulsory bindings, without premium paid (*i*); and even if the master be a freeman of the city of London, and the indentures are enrolled in London, the sessions for the county in which the master resides and in which the apprenticeship is being served have jurisdiction to discharge the apprentice, notwithstanding the saving in sect. 33 of the Act of the privileges of London and Norwich (*k*).

If the master be bound over or summoned to appear, the sessions may proceed in his absence (*l*). The justices in session have not power to order the return of any part of a premium already paid to the master, or to order that any part remaining unpaid shall not be paid (*m*).

See for the law generally relating to apprentices, Mr. Evans Austin's book on Apprentices.

SECTION 3.

OF ARTICLES OF THE PEACE.

The consideration of articles of the peace may either come before the sessions on a complaint originally made in court, or in consequence of the party being previously bound by a magistrate to appear at the sessions.

The authority of justices of the peace to take surety for the peace and for good behaviour is derived from their commission, founded upon 1 Edw. 3, stat. 2, c. 16, by which it is enacted, only in very few and general words, that persons shall be "assigned by the king in every county to keep the peace."

(*e*) *R. v. Johnson* (1701), 1 Salk. 68; *R. v. Gill* (1718), 1 Stra. 143; *R. v. Davies* (1725), 2 Stra. 704.

(*f*) And *semble*, it ought also to appear that application was first made under the statute to a justice to compose the dispute: *R. v. Gately* (1691), Carth. 198.

(*g*) *R. v. Gill*, *ubi sup.*

(*h*) *R. v. Collinbourn* (1725), 2 Ld. Raym. 1410.

(*i*) *East v. Pell* (1839), 8 L. J. M. C. 33.

(*k*) *R. v. Collinbourn*, *ubi sup.*

(*l*) *Ditton's case* (1700), 2 Salk. 490.

(*m*) *East v. Pell*, *ubi sup.*; *R. v. Vandeleer* (1717), 1 Stra. 69.

The authority to be given to them is more fully set forth in the statute 34 Edw. 3, c. 1, by which they are to have power *to restrain offenders*, and to arrest and chastise them, and cause them to be imprisoned and punished according to law, to arrest all those that they may find by indictment or suspicion, and to put them in prison; *to take of all them that be not of good fame, where they shall be found, sufficient surety and mainprize of their good behaviour towards the king and his people*; and also to hear and determine, &c., &c.

The power to keep the peace necessarily implies an authority to take surety from persons who have manifested an intention to break it; for otherwise such persons could only be restrained from the accomplishment of their intention by the actual restraint or imprisonment of their persons (*n*); and, upon the latter statute, it may be observed that the clause relating to surety and mainprize of good behaviour to be taken of persons of evil fame, is distinct from the clause relating to persons found by indictment or suspicion, which must be meant of persons charged with the actual commission of some offence, for which an indictment hath been or may be found.

It was contended in *Willes v. Bridger* (1819) (*o*), that the only power of a single justice of the peace (or, *semble*, of any number of justices of the peace out of sessions) was to bind the person against whom complaint was made for appearance *at the next sessions*, and for keeping the peace and being of good behaviour *in the meantime*. The argument in support of this contention rested mainly on the provisions of the statute 3 Hen. 7, c. 1, by which it is ordained that every justice of the peace who shall take any recognizance for the keeping of the peace shall certify, send, or bring the same recognizance to the next sessions of the peace, *that the party so bound may be called, and if the party so bound make default*, then the recognizance and the record of the default are to be certified into the Chancery, King's Bench, or Exchequer (*p*). But the court pointed out that the authority of a justice to take surety for the peace existed (as before mentioned) long before this statute. The following passage from Sir Matthew Hale was also relied upon by the plaintiff in that case:—"The statute 34 Edw. 3, c. 1, gave them power to apprehend *malefactors*, and to commit them to custody, or to bind them to their good behaviour, which was not intended perpetual, but in the nature of bail, viz., to appear at such a day at their sessions, and in the meantime to be of good behaviour." The court thus dealt with the argument founded

(*n*) *Willes v. Bridger* (1819), 2 B. & A. 278.

(*o*) *Ubi sup.*

(*p*) See, however, sect. 9, sub-sect. 3 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), *post*.

upon this passage:—"This passage is found in a chapter treating of the bailment of prisoners, and not of surety for the peace, and it is plain from the other parts of the chapter that the persons who are the subject of it are persons charged with offences for which it is supposed they are to be brought to trial. With regard to such persons, the surety or main-prize must necessarily be taken for appearance at some definite time and place, at which an indictment may be preferred or brought to trial against them; and it is proper that the surety should also extend to their good behaviour in the meantime. The statute 3 Hen. 7, c. 1, appears also to contemplate persons of this description, that is, persons against whom an indictment may be expected to be preferred. It is perfectly reasonable that such persons should be bound to appear at the next sessions, in order that they may be forthcoming to answer to an indictment. Many of those against whom surety of the peace is required are of this description; persons supposed to have actually committed, and not merely to meditate an indictable offence; and the enactment may well be considered as cumulative, rather than restrictive; as requiring that every person bound to keep the peace shall be bound also to appear at the sessions for the purpose of answering any charge that may be preferred against him, whether for any previous offence by indictment, or for a breach of the peace committed after the recognizance, and not as limiting the surety and obligation to such an appearance, and to that alone (*q*). . . . Several of the text writers quoted in the argument for the plaintiff say that the justice may take the surety for such time, in such sum as he shall think fit (which must mean, in the exercise of a sound and legal, and not of a wilful and arbitrary discretion), and no one directly asserts the contrary; although *they all say the safer course is to take the surety only for appearance at the next sessions, and for keeping the peace in the meantime*, thus referring it to the sessions to take a fresh security, if articles be exhibited, or to try the party if an indictment be preferred. The power of the justices assembled at their sessions, to take surety of the peace, is derived from their commission, and is found in the first clause, or *assignavimus*, of the commission, and by that clause the power is given to any one justice, and not to two or more, as is done by the second clause, which relates to the taking and trial of indictments, and some other matters; and, therefore, if a single justice cannot take security for a longer period than until the next sessions, it will be difficult to show that a number of justices assembled at sessions may take it for a longer time; and unless they can do so, then, as it may be in most cases expedient that the period of surety should be longer than the interval between sessions and sessions, both

(*q*) See now S. J. A. 1879, sect. 9, sub-sect. 3.

parties, or at least the party required to give the surety, and his mainpernors, must be harassed by repeated attendances to accomplish an object which may be as well effected by a single attendance, at which the whole matter may be heard and discussed. It may, in some cases, be expedient that the time and amount of the security should be settled by the concurrent sentiments of several persons, rather than by the single opinion of one individual; and, therefore, *we would be by no means understood to disapprove of the usual practice, which is, to take the surety until the next sessions only.* On the other hand, expense and trouble are saved by an adjustment of the whole matter in the first instance, and therefore this may be the most convenient course."

The court accordingly held that the commitment of the plaintiff in that case by warrant of a single justice for the space of two years, unless he should in the meantime find sureties for the peace, was valid and legal (*r*).

Surety might formerly have been required for a period of more than one year (*s*), but the power of justices of the peace out of sessions has been greatly restrained by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), which enacts (sect. 25) that the defendant, in default of compliance with an order of a petty sessional court (*i.e.*, a court of summary jurisdiction consisting of two or more justices, or of a stipendiary magistrate), may be imprisoned for a period not exceeding six months; and if the court consist of only one justice (not being a stipendiary magistrate), fourteen days. The procedure before courts of summary jurisdiction is prescribed by the Summary Jurisdiction Act, 1879. And under the Coinage Act (*t*), the Forgery Act (*u*), the Larceny Act (*v*), the Malicious Injuries to Property Act (*x*), and the Offences against the Person Act (*y*), imprisonment for not finding sureties under those Acts, as part of the punishment of offenders upon conviction, is not to exceed a year. Although described in 1819 in *Willes v. Bridger* (*z*) as "the usual practice," the practice of binding over persons to attend at the sessions, and to keep the peace and be of good behaviour in the meantime, is now but little used, though there is nothing in the Summary Jurisdiction Act, 1879, to prevent justices out of session adopting this method of procedure, if minded to do so, and

(*r*) See form of precept of the peace in Lambard's *Eirinarcha*, b. 2, c. 2, p. 85, of the edition of 1614. See also Hawkins, b. 1, c. 60; Dalt. c. 119; 2 Hale, c. 136; 4 Bl. Comm. 253.

(*s*) *R. v. Bowes* (1787), 1 T. R. 696; *Willes v. Bridger* (1819), 2 B. & A. 278.

(*t*) 24 & 25 Vict. c. 99, s. 38.

(*u*) 24 & 25 Vict. c. 98, s. 51.

(*v*) 24 & 25 Vict. c. 96, s. 117.

(*x*) 24 & 25 Vict. c. 97, s. 73.

(*y*) 24 & 25 Vict. c. 100, ss. 43, 71.

(*z*) *Ubi sup.*

there may be cases in which it would be very proper to take that course, *e.g.*, where it should be considered that the person against whom complaint is made ought to be bound for more than six months.

Justices of the peace, whether in or out of sessions, have no jurisdiction to bind over a peer or peeress, who can only be bound over in the High Court of Justice (*a*).

When the party against whom the surety of the peace is required is bound to appear at the next session of the peace, and in the meantime to keep the peace to the King and all his liege people, especially to the party claiming the security, though the recognizance for keeping the peace should be removed by *certiorari*, it is no discharge of the obligation to appear (*b*). If the party refuses to be bound, it seems he may be committed to gaol, subject to the recent statutes above referred to, till he shall comply (*c*), or till the next session.

It has been said, that, if the offender be a dangerous person, the binding him only to the next session is insufficient security; and if he be then called upon anew to give a security for further keeping the peace on account of the original offence, it is punishing a person twice for one offence. But first, it may be answered, that finding sureties of the peace is merely a proceeding of precaution against the *future*, and not a punishment for the *past*, although it be true that breaches already committed form the ground of apprehension for the future; secondly, even if it be taken in the light of a punishment, the penalty is likely rather to be diminished, than augmented, by this practice; because it gives the prosecutor the option of being satisfied with a security of shorter duration than would otherwise have been, in all probability, required.

If the party bound to appear at the sessions does not answer, his recognizance may be estreated; if he does, the court may make proclamation, that "if any man can show cause why the peace granted against *such a one* shall be continued, he shall speak;" and, if no person come to demand the peace against him, or to show cause why it should be continued, then the court may discharge his recognizance (*d*).

But if a man be thus bound, and especially to keep the

(*a*) 4 Bl. Comm. 253; Dalton, c. 117. See stat. 21 Jac. 1, c. 8, and the Crown Office Rules, 1886, Nos. 290 to 292, for the practice of the K. B. Div.

(*b*) Hawk. b. 2, c. 27. The following is the condition of the recognizance to keep the peace:

"The condition of this recognizance is such, that if the above bounden — shall keep the peace towards his Majesty the King, and all his liege people, and especially towards A. B. of — in the said county, yeoman, and — his wife for the term of [*twelve calendar months*], now next ensuing, then the said recognizance shall be void, or else shall remain in full force."

(*c*) 2 Hawk. c. 16, s. 2.

(*d*) Dalt. c. 120.

peace towards a certain person, then, though such person come not to desire the surety of the peace to be continued, yet the court, by their discretion, may bind him over till the next session, and that may be to keep the peace against that person only, if they shall think good; for it may be, that the person who first craved the peace is sick, or otherwise prevented, so as he cannot come to that session to demand the continuance of the peace further(*e*). But this has been questioned in Burn's Justice of the Peace(*f*).

If the applicant appear, his counsel may then move that the court do receive articles of the peace exhibited by him against the offender in the form subjoined(*g*). They should be ready engrossed on parchment, so as to be handed to the clerk of the peace to be read by him, after which the exhibitant must be sworn or affirm to the truth of them. The court then on the motion of counsel declare in what sum, and for what period, the defendant's recognizance shall be taken. Upon his entering into it with two sureties, his former recognizance may be discharged, but if he cannot procure sureties, the court on motion will commit him till he does so. The party is usually bound by recognizance to the next session; and so on from session to session, so long as the applicant shall be able to make it appear that his reasonable apprehensions continue. Or the justices may bind him for a certain definite period, without reference to any succeeding session, at their discretion.

Here let it be observed that a person demanding sureties of the peace (whether in the first instance before a single justice

(*e*) Dalt. c. 120, citing Lambard, 112.

(*f*) 30th ed., vol. v. p. 749.

(*g*) The following is the form of the articles of the peace:—

Michaelmas Sessions, 1836.

Middlesex. { Articles of the peace exhibited by A. B. of — cabinet
maker, on behalf of himself and Ann his wife, against
C. D. of — shoemaker, in order to preserve the lives of himself this
exhibitant, and of the said Ann his wife, from bodily harm.

This exhibitant on his oath saith, that, &c. [*stating some act of the party complained against, forming a portion of the matter of complaint*]. And this exhibitant upon his oath further saith, that, &c. [*stating in each article some distinct portion of the complaint in such manner as to render the statement intelligible*]. And this exhibitant upon his oath further saith, that (the said Ann, the wife of this exhibitant, is now so sick and weak that she cannot be removed from her house to attend this honourable court to join in the exhibition of this complaint, and that) he this exhibitant, by means of the premises aforesaid, conceives himself and his said wife to be in great danger, and he further saith, that he doth not make this complaint against the said C. D. through any hatred, malice or ill-will, which he hath or beareth towards the said C. D., but merely for the preservation as well of his own life, as of the life of his said wife, and also of their persons, from bodily harm.

A. B.

Sworn at, &c.

for immediate security, or by exhibiting articles before the justices in session) swears only to his own apprehensions, of which no other persons can form an adequate judgment; from which it has been deduced by the judges, in many cases, as a general rule, that *articles* of the peace cannot be resisted by the defendant reading affidavits on his own behalf, in contradiction of the facts there sworn to against him on any ground, except by showing *direct* evidence of express malice; such as declarations to that effect; and not *implied* malice, supported by general reasoning or collateral circumstances; and, moreover, that wherever *particular facts* of violence are stated by the complainant, it is not permitted for the defendant to controvert them; for they must be taken to be true till negatived through the medium of an appropriate prosecution (*h*). The defendant can take no other advantage than what arises from ambiguity of expression on the face of the articles (*i*). "The application to a justice for sureties of the peace is in the nature of an *ex parte* proceeding" (*k*).

By sect. 25 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), it is enacted that the power of a court of summary jurisdiction, upon complaint of any person, to adjudge a person to enter into a recognizance and find sureties to keep the peace or to be of good behaviour towards such first-mentioned person, shall be exercised by an order upon complaint, and the Summary Jurisdiction Acts shall apply accordingly, *and the complainant and defendant and witnesses may be called and examined and cross-examined*, and the complainant and defendant shall be subject to costs, as in the case of any other complaint.

There is no corresponding enactment with reference to quarter sessions, and the circumstance that it was deemed necessary to make such express provision with reference to courts of summary jurisdiction is strong confirmation of the law and procedure as above stated.

Here it will be proper to introduce some notice of what provocations are deemed sufficient cause for demanding sureties of the peace, as well as respecting the persons *at whose* suit, and *against whom* they ought to be granted, since these considerations are equally applicable to such demand before justices *out of* session, and by articles exhibited *in* session.

By the commission of the peace, one or more justices have power "to cause to come before them all those who, to any of the King's people concerning their bodies, or the firing of

(*h*) *R. v. Doherty* (1810), 13 East, 171. The cases from which this doctrine is deduced are those of *Lady Vane* (1743), 2 Stra. 1202; *R. v. Mallinson* (1853), 20 L. J. M. C. 33; the *Countess of Strathmore's case* (1787), 1 T. R. 696; *R. v. Doherty, sup.*; and *Steward v. Gromett* (1859), 29 L. J. C. P. 170.

(*i*) *R. v. Bringlee* (1733), 13 East, 174, note.

(*k*) *Per Erle, C. J., in Steward v. Gromett, ubi sup.*

their houses, have used threats, to find sufficient security for the peace, or their good behaviour, towards the King and his people; and, if they shall refuse to find such security, to cause them in the King's prisons to be safely kept, until they shall find such security."

It seems clear that wherever a person has just cause to fear that another will burn his house, or do him a corporal hurt, or that he will procure others to do so, he may demand the surety of the peace against such person, and that every justice of the peace is bound to grant it, upon the party's giving him satisfaction upon oath that he is actually under such fear, and that he has just cause to be so, and that he does not require it out of malice or vexation (*l*).

It also seems that he who is threatened to be imprisoned by another has a right to demand the surety of the peace; for every unlawful imprisonment is an assault and wrong to the person of a man. And the objection that one wrongfully imprisoned may recover damages in an action, and therefore needs not the surety of the peace, is as strong in the case of battery as in that of imprisonment; and yet there is no doubt, but that one threatened to be beaten may demand the surety of the peace (*m*), and sureties for good behaviour may be required in cases of libel against private individuals calculated to produce a breach of the peace (*n*). So it is said words of contempt, or *contra bonos mores*, uttered by an alderman against the mayor and his brother aldermen may be good cause to commit him till he has found good sureties of his good behaviour (*o*); but rash words of anger are not (*p*).

Where
demanded
through
malice or
vexation.

But if the justice shall perceive that surety is demanded merely of malice, or for vexation only, without any just cause of fear, it seems he may safely deny it; here, however, the justice shall do well to persuade him, and to show him the danger of his oath which he is to take; but yet if he will not be persuaded, but will take his oath that he is in fear, where indeed he neither doth fear, nor hath cause to fear, this oath shall discharge the justice, and the fault shall remain on such complainant (*q*).

If a man require the peace, merely because he is *at variance* or in *suit* with his neighbour, it shall not be granted (*r*).

But this fact must appear directly from the declarations of the party, for otherwise the justice, collecting such motives

(*l*) Hawk. b. 1, c. 60, s. 6.

(*m*) Hawk. b. 1, c. 60, s. 7; *R. v. Tregarthen* (1833), 5 B. & Ad. 680; *R. v. Bringlee* (1733), 13 East, 174, n.

(*n*) *Haylock v. Sparke* (1853), 22 L. J. M. C. 67.

(*o*) *Bagg's case* (1615), 11 Rep. 93 b, 98 a.

(*p*) *Stampe v. Hyde* (1620), 2 Roll. Rep. 199, 227.

(*q*) Dalt. c. 116, s. 16; *Steward v. Gromett, per Erle*, C. J. (1859), 29 L. J. C. P. 172.

(*r*) Dalt. c. 116; 2 Hawk. P. C. b. 1, c. 61, ss. 3, 4.

inferentially, will take on himself a responsibility not justified by the cases just cited.

But all the authorities agree that fear lest another will hurt a man's servant, or his cattle, or goods, is not sufficient ground for requiring surety of the peace.

But it is otherwise as to his *wife* or *child*, for he may crave the peace for their protection, and the justice ought to grant it (*s*).

If the children be under the age of discretion, there can be no doubt respecting the parent's claim on the authority of the justice for protection, on his (the father's) oath.

The surety of the peace shall not be granted but where there is a fear of some present or future danger, and not for any breach of the peace that is past; for his surety of the peace is only for the security of such as are in fear: but the party wronged may punish the offender by indictment; and the justice may bind over the affrayer to answer unto the indictment.

Where a partner by violence forces his co-partner out of the business premises of the firm, and threatens such co-partner with violence and danger to his life if the latter should venture to enter again on the premises, and it is necessary for such co-partner to enter and use the premises for the purpose of carrying on his ordinary business as partner, it is a fit case for articles of the peace (*t*). So, where a man assaulted another for writing a letter to a young lady, and threatened him if he wrote again he would flog him within an inch of his life, and repeated this threat on a subsequent occasion (*u*).

It seems to be agreed that all persons whatsoever, under the King's protection, being of *sane memory*, whether they be natural and good subjects, or *aliens* or *excommunicate*, or attainted of *treason*, have a right to demand surety of the peace. And it is certain a *wife* may demand it against her husband, and that a husband also may have it against his wife (*x*). And there is no doubt but it ought, upon cause of complaint, to be granted by any justice of the peace, against any person whomsoever, under the degree of nobility, whether he be a magistrate or private person, and whether he be of full age or under age. But infants and femmes covertes ought to find security by their friends, and not to be bound themselves. And the safest if not the only way of proceeding against a peer, is by complaint to the High Court of Justice (*y*).

Who may demand surety.

Against whom it may be demanded.

The usual practice of courts of quarter session, we have

(*s*) Dalt. c. 116; 2 Hawk. P. C., b. 1, c. 61, ss. 3, 4.

(*t*) *R. v. Mallinson* (1853), 20 L. J. M. C. 33.

(*u*) *Ex parte Hulse, R. v. Tollemache* (1821), 21 L. J. M. C. 21.

(*x*) *Sims's case* (1743), 2 Stra. 1207.

(*y*) Hawk. b. 1, c. 28, ss. 2, 3, 4 and 5; 4 Bla. Com. 254; Dalton, c. 117.

seen, is to continue a recognizance for keeping the peace, from session to session, until it be discharged by order of the court. That of the Court of King's Bench is to continue the person bound to keep the peace upon his recognizance for twelve months; and if no indictment be, in the interim, preferred against him, to discharge it at the expiration of that time. But these courts are not confined to any particular period, for they may require bail for such a length of time as they shall think necessary for the preservation of the peace (z).

This seems likewise to be the practice of the Court of Chancery; for, upon a motion to discharge a writ of *supplicavit*, it was said by Lord Chancellor *Macclesfield*: "the application is too early; let the party stay till a year be expired, and in the meantime let him take care to behave peaceably" (a).

And if a man be bound to keep the peace during his life (which, as we have already seen, a court of session, upon sufficient cause, may legally do), or generally without any time or day limited; in such case, it is said, neither the King, the justice, the party, nor the sessions, can discharge this recognizance during the life of the party so bound, by release or otherwise (b).

Recogni-
zances, how
discharged.

If the person who has entered into a recognizance for keeping the peace die, the recognizance thereby becomes discharged, unless already broken (c).

Also the demise of the King is a discharge of a recognizance for keeping the peace; for as the condition is "to keep our peace," his successor cannot take advantage of a breach (d).

A release from the person upon whose complaint it was entered into, is in no case a discharge of a recognizance for keeping the peace; for the recognizance was entered into to the King, to keep the peace towards him and all his liege people; however, such a release may be a good inducement to the court, to which such a recognizance shall be certified, to discharge it, if it be within their power (e).

After the condition of a recognizance for keeping the peace is broken, the King may pardon the forfeiture; but the King cannot release the condition before it is broken; because the

(z) See cases cited by Erskine, *arg.* in *R. v. Bowes* (1787), 1 T. R. 696; and see *R. v. Lewis* (1729), 2 Stra. 835; *Baynum v. Baynum* (1746), Ambler, 64.

(a) *Clavering's case* (1723), 2 P. Wms. 202. And see also statement of the practice of the Court of Chancery, by Lord Hardwicke, in *Baynum v. Baynum*, *ubi sup.*

(b) Lambard, 113. *Sed qu.* for there would seem to be no good reason to be urged against the discharge of such a recognizance by the concurrence of the King and of the party.—EDS. See Hawk. b. 1, c. 28, s. 17.

(c) 1 Hawk. bk. 1. c. 28, s. 17.

(d) *Ibid.*

(e) *Id. ibid.*; 4 Bla. Com. 254.

person upon whose complaint the recognizance was entered into has a kind of interest in the condition (*f*). Sect. 26 of the Summary Jurisdiction Act, 1879, enables courts of summary jurisdiction to reduce the sureties or dispense with them altogether, in cases where a person has been committed to prison by a court of summary jurisdiction for default in finding sureties; but there is no corresponding enactment as to persons committed by courts of quarter session.

The demand of a recognizance for surety of the peace has been treated of as being *first made* before a single justice (*g*), and *continued* by articles exhibited before the justices in session. It must not be understood, however, to come before the latter in the manner of an appeal from the former, for there is no reason why an original application should not be made to the justices in session, if the party complaining consider such application sufficiently early for his protection. In that case, a warrant must of course proceed from the bench, against the offender; but the recognizances, both for the immediate preservation of the peace, and for his future appearance at the next session, may be taken before a single justice, if not apprehended before the adjournment, or termination, of the court. The warrant or order of quarter sessions in such a case, for the taking of recognizances before a single justice or individual justices, must direct the commitment, in case of default; for if it omit to do the latter, in case of disobedience of the order to enter into recognizance, the justice or justices before whom they were ordered to be taken have no power to commit the defaulting parties (*h*).

Form of the
warrant from
the bench.

The Court of King's Bench rejected articles of the peace which a person residing in a distant part offered to swear against a person resident in the same place, saying, "he might have gone before a justice of the neighbourhood and claimed the security of the peace there" (*i*). If the justice is averse to act, he may be compelled to do so as a ministerial officer, by writ of *supplicavit* issued out of the King's Bench or Chancery; but that writ is seldom used, for the recognizances are generally taken by the superior court itself when applied to (*k*); but since the 11 & 12 Vict. c. 44, if a justice refused to act on some legal ground of objection, probably the Court of King's Bench, upon motion by the applicant, and upon affidavit of the facts, would grant a rule to the justice ordering him to act under sect. 5.

(*f*) 1 Hawk. bk. 1. c. 28, s. 17.

(*g*) But see now Summary Jurisdiction Act, 1879, s. 25.

(*h*) *R. v. Ashton* (1845), 7 Q. B. 169. In such a case it is conceived that the statutory limitation of fourteen days imposed upon the powers of a single justice by sect. 25 of the Summary Jurisdiction Act, 1879, has no place, inasmuch as in such a case the justice is merely acting in obedience to the command of quarter sessions.

(*i*) *R. v. Waite* (1759), 2 Burr. R. 780.

(*k*) 4 Bla. Com. 253.

The amount of security to be found by the defendant for preserving the peace, is in the discretion of the court, or the single magistrate. An application to the superior court to reduce it, when fixed by the latter, has been refused, on the ground that the court could not interfere with the exercise of his discretion, if he has proceeded on a sufficient information on oath (*l*). It is for the justices to whom the application is made to judge in what sense the language alleged to be threatening is used; and the court will not discharge recognizances to keep the peace on the ground that such words were used by way of metaphor, and not literally (*m*). A person who is committed to prison in default of finding sureties of the peace till the next sessions, and at the next sessions is discharged, no one appearing to prosecute, is not entitled to a copy of the examinations upon which he was ordered to find sureties, and committed in default, as such a case is not within the 11 & 12 Vict. c. 42, s. 27 (*n*).

If the warrant for apprehending the offender be issued, in the first instance, by the justices in session assembled, it should be in the following form, or to the like effect, in the name of the King, but under the teste of the chairman, and one or more of the other justices.

County of — } Edward VII., by the grace of God of the United
to wit. } Kingdom of Great Britain and Ireland and of the
British Dominions beyond the Seas King, Defender of the Faith,
and so forth; to our sheriff of our county of — the chief constable
of our said county and all other our constables and other ministers
in the said county of — greeting. Forasmuch as P. O. of —
in the said county, yeoman, hath personally come before A. B.
and other our justices assigned to keep the peace within the county
aforesaid, and also to hear and determine divers felonies, trespasses and
other misdemeanours in the said county committed, and hath taken a
corporal oath that the said P. O. is afraid that D. D. of — in the said
county, yeoman, will beat [*wound, maim or kill*] him, [*or burn his house*],
and hath prayed surety of the peace [*or of the good behaviour, if it be so*]
against him the said D. D. Therefore we command and charge you,
jointly and severally, but immediately upon receipt hereof, you omit rot,
by reason of any liberty within the county aforesaid, but that you take
the aforesaid D. D. if he can be found in the county aforesaid, and bring
him before the said A. B. and other our justices so as aforesaid assigned
to keep the peace within our county aforesaid, if they shall then be
sitting; and if not, then before some one or more of our said justices in
and for our county aforesaid, to find sufficient surety and mainprize, as
well for his personal appearance at the next general quarter session of
our peace, to be holden at — or elsewhere, in and for the said county,
as also for our peace in the meantime to be kept towards us and all our
liege people; and more especially towards the said P. O.; that is to say,
that he the said D. D. shall not do, nor by any means procure or cause

(*l*) *R. v. Holloway* (1834), 2 Dowl. P. C. 525; *R. v. Tregarthen* (1833), 5 B. & Ad. 680.

(*m*) *Per cur. R. v. Tregarthen, ubi sup.*, in which case the words complained of were: "The rod you have in pickle for me you must prepare yourself to receive such a castigation with as you deserve, and I am determined you shall have it."

(*n*) *Ex parte Humphrys* (1850), 19 L. J. M. C. 189.

to be done, any of the said evils to any of our said people, and particularly to the said P. O. ; [or, *if it is for the good behaviour* — as also for his good behaviour, in the meantime, towards us and all our liege people ; and more especially towards him the said P. O. &c.]. And in default of finding such sufficient surety and mainprize as aforesaid to be further dealt with according to law (*o*).

Every justice taking a recognizance for keeping the peace shall certify the same at the next sessions, that the party bound may be called there. If he make default, the default shall be there recorded, and the recognizance may be estreated or put in force under the 7 Geo. 4, c. 64, s. 31, and 3 Geo. 4, c. 46, *post*. If the party have any good excuse, such as sickness, imprisonment, inundation of waters, snow storm, &c. for his not appearing, the sessions are not bound peremptorily to put in force his recognizance, but may equitably consider of the reasonableness of such excuse (*p*). The general practice was conformable with this doctrine before the 7 Geo. 4, c. 64 ; and as the recognizance might be taken by a single justice at any time, so soon as the offender was able to attend, a respite of proceedings by the session, till that opportunity arrived, seemed only consistent with justice (*q*).

There is no doubt that the recognizances taken may be forfeited by any actual violence to the person of another, whether it be done by the party himself, or by others through his procurement, as manslaughter, rape, robbery, unlawful imprisonment, and the like (*r*). And even by threatening to do any act of violence against another *in his presence* ; and it is said, in *his absence* also, if accompanied by lying in wait to execute it (*s*) ; but not by mere words of anger or abuse (*t*).

And the justices may now proceed against the party for a forfeiture of his recognizance, either in respect of his not appearing, or of his breaking the peace under the 3 Geo. 4, c. 46 ; 4 Geo. 4, c. 37, and 7 Geo. 4, c. 64 ; and the recognizance itself, with the record, on default of appearance, are no longer removed into the High Court of Justice. And now under 16 & 17 Vict. c. 30, s. 2, where any recognizance to keep the peace or to be of good behaviour is entered into by any person as principal or surety before the court of general or quarter sessions of the peace of any county, riding, division, city, borough or place, or before any justice or justices of the peace of any county, riding, division, city, borough or place, it shall be lawful for any such court of general or quarter

(*o*) The concluding words from “and in default” to the end of the form are suggested as proper to be used in consequence of *R. v. Ashton* (1845), 7 Q. B. 169.

(*p*) Hawk. b. 1, c. 28, s. 18 ; Dalt. c. 120.

(*q*) Carr. Cr. L. 131.

(*r*) Hawk. b. 1, c. 60, s. 20.

(*s*) *Id.* s. 21 ; *Stampe v. Hyde* (1620), 2 Roll. Rep. 199, 227.

(*t*) Hawk. b. 1, c. 60, s. 22.

sessions of the peace as aforesaid, upon applications made to such court to declare such recognizance to be forfeited upon *proof of a conviction of the party* bound by such recognizance of any offence which is in law a breach of the condition of the same; and upon further proof that a notice in writing signed by the person seeking to put such recognizance in force has seven clear days before the commencement of such sessions been personally served upon or left at the usual place of abode of the party, or each of the parties, if more than one, who entered into such recognizances that an application will be made to the said general or quarter sessions that the said recognizance shall be declared forfeited; and if such recognizance shall be declared forfeited, all such proceedings shall be had thereon as in the case of a recognizance forfeited at such court of general or quarter sessions, and all the provisions of 3 Geo. 4, c. 46, and 4 Geo. 4, c. 37, applicable to a recognizance so forfeited at such court shall apply to a recognizance which shall, upon such application and proof as is hereinbefore mentioned, be declared to be forfeited; and upon notice in writing of such intended application to the said general or quarter sessions being given to any justice or justices before whom any such recognizance shall have been taken, four clear days before the commencement of the said sessions, the said justice or justices shall transmit the said recognizance to the clerk of the peace of the county, riding, division, city, borough or place within which the said recognizance shall have been taken, with a certificate that the said recognizance is sent to him by reason of such last-mentioned notice having been so given as aforesaid.

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 9 (2), where a recognizance conditioned to keep the peace, or to be of good behaviour, or not to do or commit some act or thing, has been entered into by any person as principal or surety before a court of summary jurisdiction, that court or any other court of summary jurisdiction acting for the same county, borough or place, upon proof of the conviction of the person bound as principal by such recognizance of any offence which is in law a breach of the condition of the same, may by conviction adjudge such recognizance to be forfeited, and adjudge the persons bound thereby, whether as principals or sureties, or any of such persons, to pay the sums for which they are respectively bound: and, by sub-sect. (3) of the same section, except where a person seeking to put in force a recognizance to keep the peace or to be of good behaviour, by notice in writing, requires such recognizance to be transmitted to a court of general or quarter sessions, the recognizances to which this section applies shall be dealt with in manner in this section mentioned, and, notwithstanding any enactment to the contrary, shall not be transmitted, nor shall the forfeiture thereof be certified, to general or quarter sessions.

A warrant of committal of a party until he find sufficient

sureties to keep the peace is bad if it omit to specify the time for which, in default of sureties, he is to be kept in prison; but it need not mention the amount in which the sureties are to be bound (*u*).

A list must be prepared by the officer of the court, specifying the name of every person bound by such recognizance, and defaulting to appear, together with the residence, trade or calling of every of them, distinguishing the principals from the sureties, and stating the cause of non-appearance, if known, and whether, by reason of such non-appearance, the ends of justice have been defeated or delayed. In counties not corporate, the officer must lay this list before the chairman or two other justices of the peace who have attended the court, or in boroughs before the recorder, who are to examine it and make such order touching the estreating or putting in process of any such recognizance as shall appear to them respectively to be just; and the officer cannot estreat or put it in process without the written order of the chairman, &c. (*x*).

The numerous hardships arising from indiscriminately estreating all forfeited recognizances into the Exchequer have been checked by this salutary provision.

SECTION 4.

OF INCORRIGIBLE ROGUES.

The disposal of vagrants constitutes a portion of the business of a quarter session of the peace. Idleness in any of the members of a community is a disadvantage to it, because on the diffusion of active and productive labour depends its vigour and its wealth. More weight has been attached to these axioms in this kingdom perhaps than in most others, whence the numerous statutes that have been enacted against this evil. The laws against vagabonds may be traced up as high as the reign of Henry II. Under that of Queen Elizabeth they became numerous and more systematic, because the dissolution of monasteries by her father had thrown on the bounty of the public a numerous herd of beggars, who had before been under the protection of those communities. The Act now in force, and which embodies and extends numerous former provisions, is 5 Geo. 4, c. 83, which points out three classes of persons: 1. *Idle and disorderly persons*. 2. *Rogues and vagabonds*. 3. *Incorrigible rogues*. It will be perceived that it is in the case of the last class only that the justices in

Vagrant Act,
5 Geo. 4,
c. 83.

(*u*) *Prickett v. Gratrex* (1846), 15 L. J. M. C. 145.

(*x*) 7 Geo. 4, c. 64, s. 31; and see 3 Geo. 4, c. 46, ss. 5, 6.

Idle and disorderly persons.

session have an original jurisdiction to exercise; but it may be well here to present the whole effect of the provisions.

The following are, under the 5 Geo. 4, c. 83, to be deemed *idle and disorderly persons*, whom any justice of the peace is empowered to commit (being convicted before him on his own view or by the confession of the offender, or by the evidence of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding one calendar month (*y*) [fourteen days if the conviction be before one justice alone (Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 20 (7))], subject to an appeal to the sessions, on giving notice in writing of the grounds of appeal to the convicting magistrate within seven days, and entering into recognizance with sufficient surety personally to appear and prosecute the appeal; on which the party convicted is to be discharged.

1. Every person being able wholly, or in part, to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish, township, or place (*z*).

2. Every person returning to and becoming chargeable in any parish, township, or place from whence he or she shall have been legally removed by order of two justices of the peace, unless he or she shall produce a certificate of the churchwardens and overseers of the poor of some other parish, township, or place, thereby acknowledging him or her to be settled in such other parish, township, or place (*a*).

3. Every petty chapman or pedlar wandering abroad, and trading without being duly licensed, or otherwise authorized by law.

4. Every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous and indecent manner.

(*y*) The commitment must be for a precise definite time expressed in the warrants: see *Baldwin v. Blackmore* (1758), 1 Burr. 596; *R. v. Hall* (1765), 3 Burr. R. 1636. The warrant must state that the offender had been convicted of the offence, and not merely that he was charged: *R. v. Rhodes* (1791), 4 T. R. 220. It must also, like every other warrant of commitment, show the authority of the committing justice: *R. v. York* (1770), 5 Burr. R. 2684.

(*z*) The warrant for commitment for vagrancy in deserting a family must state that the family were actually chargeable: *R. v. Hall, sup.* And a man is not legally bound to maintain his wife who has left him and committed adultery, though he himself has committed adultery since her departure: *R. v. Flintan* (1830), 1 B. & Ad. 227; nor if she leave him, though her leaving is caused by his ill-usage: *Flannagan v. Bishop Wearmouth (Overseers)* (1857), 27 L. J. M. C. 46.

(*a*) Applied by 7 & 8 Vict. c. 101, s. 55, to poor persons returning and becoming chargeable in the asylum of any district established under that Act.

5. Every person wandering abroad, or placing himself or herself in any public place, street, highway, court or passage, to beg or gather alms, or causing, or procuring, or encouraging any child or children so to do.

6. Every person applying for relief at any workhouse, or to any relieving officer or overseer, having at the time of such application in his possession and under his immediate control any money or other property, of which, on inquiry made by the guardians or their officers, or by overseers, he shall not make full and complete disclosure (*b*).

7. Every woman neglecting to maintain her bastard child, being able wholly or in part so to do, whereby such child becomes chargeable to any parish or union (*c*).

The following are, under 5 Geo. 4, c. 83, to be described as *Rogues and vagabonds*, whom it is lawful for any justice of the peace to commit (being convicted before him by the confession of the offender, or by the evidence on oath of one or more credible witness or witnesses) to the house of correction, there to be kept to hard labour for any time not exceeding three calendar months [fourteen days if the conviction be before one justice alone (Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, s. 20 (7))], subject, as in the case of "idle and disorderly persons," to an appeal on the same conditions to the sessions. Rogues and vagabonds.
Appeal.

1. Every person committing any of the offences hereinbefore mentioned, after having been convicted as an idle and disorderly person.

2. Every person pretending or professing to tell fortunes, or using any subtle craft, means, or device by palmistry, or otherwise, to deceive and impose on any of his Majesty's subjects.

3. Every person wandering abroad, or lodging in any barn or out-house, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or waggon, not having any visible means of subsistence, and not giving a good account of himself or herself.

4. Every person wilfully exposing to view, in any street, road, highway, or public place, any obscene print, picture or other indecent exhibition, or exposing, or causing to be exposed, to public view in the window or other part of any shop, or other building situate in any street, road, highway, or public place, any obscene print, picture, or other indecent exhibition (*d*).

5. Every person wilfully, openly, lewdly, and obscenely exposing his person in any street, road, or public highway, or in the view thereof, or in any place of public resort, with intent to insult any female.

(*b*) 11 & 12 Vict. c. 110, s. 10.

(*c*) 7 & 8 Vict. c. 101, s. 6.

(*d*) 1 & 2 Vict. c. 38, s. 2. See *Dugdale v. R.* (1853), 22 L. J. M. C. 50, as to procuring indecent prints, &c. with intent to exhibit them.

6. Every person wandering abroad, and endeavouring, by the exposure of wounds or deformities, to obtain or gather alms.

7. Every person going about as gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence.

8. Every person running away and leaving his wife (*e*), or his or her child (*f*) or children chargeable, or whereby she, or they, or any of them, shall become chargeable to any parish, township, or place.

9. Every woman deserting her bastard child, whereby such child becomes chargeable to any parish or union, or twice convicted of neglecting to maintain such child, whereby, &c. (*g*).

10. Any person received into an asylum (for houseless poor), under 7 & 8 Vict. c. 101, who shall wilfully give a false name, or make a false statement, or shall be proved to have given two or more different names on two or more different occasions when so received into any such asylum, such person not having lawfully changed her name in consequence of marriage (*h*).

11. Every person playing or betting by way of wagering or gaming in any street, road, highway, or other open and public place, or in any open place to which the public have or are permitted to have access, at or with any table or instrument of gaming, or any coin, card, token, or other article used as an instrument or means of such wagering or gaming, at any game or pretended game of chance (*i*).

A railway carriage while on a journey is a place within the section (*k*).

Betting odds on one of several dogs at a coursing meeting, and paying half a sovereign to the person laying the odds against, is not playing or betting with a coin as an instrument of gaming within the meaning of the above section (*l*). The *pari mutuel* is an instrument of wagering or gaming, and the game a game of chance within the above statute (*m*).

12. Every male person who (*a*) knowingly lives wholly or

(*e*) A wife who has left her husband, and committed adultery, is not within this term, though the husband has also committed adultery since her departure: *R. v. Flintan* (1830), 1 B. & Ad. 227. A mother who, having obtained an order for the admission of herself and two children into the union workhouse, leaves her children at the gate of the workhouse with the order in their hands, and returns to her usual residence, which is in the borough where the workhouse is situate, is not within the statute: *Guardians of Cambridge Union v. Parr* (1861), 30 L. J. M. C. 241.

(*f*) This refers to the desertion of legitimate and not of illegitimate children: *R. v. Maude* (1842), 2 Dowl. N. S. 58.

(*g*) 7 & 8 Vict. c. 101, s. 6.

(*h*) *Ibid.* s. 53.

(*i*) 36 & 37 Vict. c. 38.

(*k*) *Langrish v. Archer* (1882), 10 Q. B. D. 44.

(*l*) *Hirst v. Molcsbury* (1870), L. R. 6 Q. B. 130.

(*m*) *Tollett v. Thomas* (1871), L. R. 6 Q. B. 514.

in part on the earnings of prostitution; or (b) in any public place persistently solicits or importunes for immoral purposes (n).

13. Every person having in his or her custody or possession any picklock, key, crow, jack, bit, or other implement, with intent feloniously to break into any dwelling-house, warehouse, coach-house, stable, or out-building, or being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument with intent to commit any felonious act (o).

14. Every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or out-house, or in any enclosed yard, garden, or area, for any unlawful purpose (p).

15. Every suspected person, or reputed thief, frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway, or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, or any highway, or any place adjacent to a street or highway, with intent to commit a felony (q).

In proving the intent to commit a felony it is not necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the justice of the peace or court before whom or which he is brought, it appears to such justice or court that his intent was to commit a felony (r). This section was passed since *Ex parte Timson* (s).

A platform on a railway station is a place of public resort (t), and so is a private house in which a sale by auction is being held (u).

A commitment must show on its face that the conviction

(n) 61 & 62 Vict. c. 39. As to issue of search warrant by a court of summary jurisdiction, see sect. 1, sub-sect. (2). By sub-sect. (3) of the same section, where a male person is proved to live with or to be habitually in the company of a prostitute, and has no visible means of subsistence, he shall, unless he can satisfy the court to the contrary, be deemed to be knowingly living on the earnings of prostitution.

(o) 5 Geo. 4, c. 83, s. 4. The conviction under this head of vagrancy must state that the implements, or some of them, were found upon the prisoner at the time of his apprehension: *R. v. Brown* (1798), 8 T. R. 26.

(p) Persons found by night in the company of the servants of the house, for the purpose of joining in the consuming of provisions of the master without his consent or knowledge, may or may not be there for the purpose of feloniously stealing the provisions, but, if so, are there for an unlawful purpose within the Act: *Kirkin v. Jenkins* (1863), 32 L. J. M. C. 140.

(q) 34 & 35 Vict. c. 112, s. 15.

(r) *Ibid.*

(s) (1870), L. R. 5 Ex. 257.

(t) *Ex parte Davis* (1857), 26 L. J. M. C. 178.

(u) *Sewell v. Taylor* (1859), 29 L. J. M. C. 50.

was warranted by the statute. Thus, in *Ex parte Eliz. Jones*(*u*), a commitment was held bad for omitting to state that the street in question led to a canal, &c., or was itself a place of public resort, or was a street which led to a place of public resort. But where it was stated that prisoner was “found” in a place of public resort the commitment was held sufficient, though it was not stated that the prisoner “frequented” that place(*v*). But where a prisoner has been lodged in gaol under a bad warrant of commitment under this Act, a good warrant of commitment, subsequently delivered to the gaoler, but before a rule for a *habeas corpus* has been obtained, is a good answer to that rule(*w*).

16. Every person apprehended as an idle and disorderly person, and violently resisting any constable or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended.

Right of
appeal.

The power of appeal is given by 5 Geo. 4, c. 83, s. 14, which enacts, that any person aggrieved by any act or determination of any justice or justices of the peace out of sessions in or concerning the execution of this Act may appeal to the next general or quarter sessions for the county, riding, division, or place in or for which such justice or justices shall have so acted, giving to the justice or justices of the peace, whose act or determination shall be appealed against, notice in writing of such appeal and of the ground thereof within seven days after such act or determination, and before the next general or quarter sessions, and entering within such seven days into a recognizance with sufficient surety before a justice of the peace.

Notice of
appeal.

Recognizance
to prosecute
the appeal.

Procedure on appeal is now regulated by the Summary Jurisdiction Acts, 1879 and 1884, and the rules made thereunder. See Appeals against Summary Convictions and Orders, *post*.

By 1 & 2 Vict. c. 38, s. 1, when any person aggrieved by any act or determination of any justice or justices of the peace out of sessions in or concerning the execution of the Act 5 Geo. 4, c. 83, shall have appealed against such act or determination according to the provisions of the said Act, and shall thereupon have been discharged out of custody, and such person shall not personally appear and prosecute such appeal at the general or quarter sessions according to the recognizance entered into on such appeal, it shall be lawful for the justices assembled at such general or quarter sessions, or for any justice of the peace for the county or place in which such person shall have been convicted, on proof of the said

(*u*) (1852), 16 J. P. 298.

(*v*) *Re Cross* (1856), 26 L. J. M. C. 28.

(*w*) *Ex parte Cross* (1857), 26 L. J. M. C. 201.

conviction, and on proof by certificate under the hand of the clerk of the peace for the said county or place, or of the person acting as his deputy, that the person so convicted did not personally appear to prosecute such appeal, to issue a warrant for the apprehension and committal of such person for such period of time as, together with the days during which such person so convicted shall have been imprisoned, if any, previous to being discharged by reason of appeal, shall complete the full term for which such person was adjudged to be imprisoned at the time of his or her said conviction.

Warrant of apprehension on failure to support appeal.

By 5 Geo. 4, c. 83, s. 9, when any justice shall commit such incorrigible rogue to the house of correction, there to remain till the next general or quarter sessions, or when any such idle or disorderly person, rogue, and vagabond, or incorrigible rogue shall give notice of his or her intention to appeal against the conviction of him or her, and shall enter into recognizance as hereinafter directed to prosecute such appeal, such justice shall require the person by whom such offender shall be apprehended, and the person or persons whose evidence shall appear to him to be material to prove the offence and to support such conviction, to become bound in recognizance to his Majesty, his heirs and successors, to appear at the said general or quarter sessions to give evidence against such offender touching such offence; and the justices of the peace at their said general or quarter sessions are hereby authorized and empowered, at the request of any person who shall have become bound in any such recognizance, to order the treasurer of the county, riding, division, or place in which the offence shall have been committed, to pay unto such prosecutor, and unto the witness or witnesses, on his or her behalf, such sum or sums of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor and such witness or witnesses respectively for the expenses he, she, or they shall severally have been put to, and for his, her, or their trouble and loss of time in and about such prosecution, which order the clerk of the peace is hereby directed and required forthwith to make out and deliver unto such prosecutor, or unto such witness or witnesses, upon being paid for the same the sum of two shillings, and no more.

Prosecutors and witnesses may be bound over to appear on appeal and then expenses may be ordered.

By sect. 10, when any incorrigible rogue shall have been committed to the house of correction, there to remain until the next general or quarter sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned in the house of correction, and be there kept to hard labour for any time not exceeding one year from the time of making such order, and to order further, if they think fit, that such offender (not being a female) be punished by whipping at such time during his imprisonment and at such place within their jurisdiction as according to the

Punishment—hard labour—whipping.

nature of the offence they in their discretion shall deem to be expedient.

Incorrigible
rogues.

The following persons are to be deemed *incorrigible rogues* under 5 Geo. 4, c. 83, s. 5 :—

1. Every person breaking or escaping out of any place of legal confinement, before the expiration of the term for which he or she shall have been committed, or ordered to be confined by virtue of this Act.

2. Every person committing any offence against this Act, which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be, and duly convicted thereof (*x*).

3. And every person apprehended as a rogue and vagabond, and violently resisting any constable, or other peace officer so apprehending him or her, and being subsequently convicted of the offence for which he or she shall have been so apprehended.

As to these it is enacted, "That it shall be lawful for any justice of the peace to commit such offender (being thereof convicted before him by the confession of such offender, or by the evidence on oath of one or more credible witnesses) to the house of correction, there to remain until the next general or quarter sessions of the peace; and every such offender, who shall be so committed to the house of correction, shall be there kept to hard labour during the period of his or her imprisonment" (*y*).

Sect. 6 authorizes any person whosoever to apprehend any person who may be found offending against the Act, and to convey such person before a justice of the peace, or deliver him or her to a constable. Sects. 6 and 11 provide for the punishment of constables neglecting their duty to apprehend, &c. offenders. Sect. 11 also provides for the punishment of persons interfering with constables in the execution of their duty under the Act. Sect. 7 gives power to constables apprehending persons as offenders under the Act to seize any horse, mule, ass, cart, car, caravan, or other vehicle or goods in the possession of such offender, and to carry the same before a justice, and the same section empowers the convicting justice to order such offender to be searched, and his boxes, packages,

(*x*) A question has been raised whether persons once convicted under the previous Vagrant Acts as *rogues and vagabonds* were under these words to be deemed *incorrigible rogues* for a second offence of a like nature. Upon this Lord Lyndhurst, when attorney-general, gave an opinion, inserted in Chetwynd's 24th ed. of Burn's Justice, p. 568, answering the question in the affirmative.

(*y*) Sect. 5.

&c. inspected in the presence of such justice ; and such justice may order that any money found upon such offender shall be applied towards the cost of his apprehension and conveyance to and maintenance in prison, and if the money found upon such offender is not sufficient, may order sale to be made of a sufficient part of his personal effects for the before-mentioned purposes. Sect. 13 authorizes the issue of search warrants to search lodging houses for suspected offenders.

As to chargeability of offenders, see sect. 20.

The law as to lunatic vagrants is not affected by the Act (z).

(z) Sect. 22.

PART III.

OF APPELLATE JURISDICTION.

CHAPTER I.

OF MATTERS OF PRACTICE IN APPEALS GENERALLY.

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SECTION 1.

OF THE JURISDICTION OF THE SESSIONS TO ENTERTAIN APPEALS ;—
OF THE RIGHT TO APPEAL, AND THE PARTIES THERETO.

WE now come to the consideration of appeals ; generally one of the most intricate, as well as important, of the subjects submitted to sessions of the peace. The most cursory acquaintance with any book on the office and duties of a justice of the peace must be sufficient to induce a conviction that it would be an unprofitable labour to introduce indiscriminately, under this division, all the subjects on which an appeal lies to the session from the adjudications of individual magistrates.

Appeal, according to the general use of the word, signifies a complaint to a superior tribunal of the erroneous judgment of an inferior one, brought in order to avoid or quash it. The only application of this remedy with which we have any concern here is in reference to its use in bringing the orders or convictions of justices acting out of general or general quarter sessions to the review of those tribunals.

What it is.

Where an appeal is given generally the court is judge of law as well as fact, so that where there are no words which restrain the appellate jurisdiction, there is no principle of law which prevents the party aggrieved from having his remedy by appeal, where the grievance is matter of law more than where it is matter of fact, as, for instance, where an order appealed against appears on the face of it to be bad in substance (*a*).

On questions
both of law
and fact.

Where, therefore, the party aggrieved by a decision of the justices, or by an order, made within their jurisdiction, has two grounds of complaint, one of law as well as one of fact, he would, of course, resort to the quarter sessions as the court of appeal, but if his objection is one only of law, he has the choice of appealing to the quarter sessions or of going to the King's Bench Division of the High Court on a case which he may require justices to state under the Summary Jurisdiction Acts; but if his objection is one only on the facts he must make his complaint by appeal, if an appeal lies.

A statute by giving an appeal to quarter sessions against orders or judgments of justices does not thereby impliedly take away the right to have a case stated by justices on a matter of law (*b*).

Appeal, when
it lies.

The right of appeal is a right which can only exist by statute (*c*), and thus, inasmuch as the 8 & 9 Vict. c. 109, under which billiard licences are granted, gives no appeal except against convictions under that Act, and the 9 Geo. 4, c. 61, gives an appeal only with reference to the refusal to grant alehouse licences, there is no appeal against a refusal to grant a billiard licence (*d*); and the right of appeal thus differs from the remedy by *certiorari*, which, as we shall hereafter see, is a common-law right for the purpose of obtaining the judgment of one of the superior courts on some act of a court below; but the right to appeal, though not created by express affirmative language, may arise by necessary implication from the language used (*e*). Nor can a right of appeal be extended by equitable construction to cases not distinctly enumerated in the Act. The 25 Geo. 3, c. 72 (repealed), after empowering *two justices*, on complaint, to hear and determine matters respecting breaches of the excise law, and on their neglect giving similar power to the sub-commissioners, proceeded to allow persons "aggrieved by any judg-

(*a*) *R. v. Justices of Worcestershire* (1854), 3 E. & B. 488, *per* Coleridge, J.

(*b*) *Steele v. Brannan* (1872), 41 L. J. M. C. 85.

(*c*) *R. v. Justices of Warwickshire* (1856), 25 L. J. M. C. 119; *R. v. Cashibury* (1823), 3 D. & R. 35; *R. v. Hanson* (1821), 4 B. & A. 521; *R. v. Justices of Oxfordshire* (1813), 1 M. & S. 448; *R. v. Justices of Worcestershire*, *ubi sup.*

(*d*) *R. v. Justices of Devonshire*, *Ex parte Chamberlain* (1857), 8 E. & B. 644.

(*e*) *R. v. Justices of Worcestershire*, *per* Coleridge, J., *ubi sup.*; *R. v. Justices of Warwickshire*, *ubi sup.*

ment of the *sub-commissioners*" to appeal to the sessions, but made no mention of any appeal from the judgment of the two justices. It was accordingly held, that the incorporation in that Act, by reference, of all remedies given by *any excise laws* gave no right of appeal although the right of appeal was given by *some* of the excise laws then in force (*f*). But, on the other hand, the operation of a general clause of appeal cannot be excluded by mere inference drawn from other clauses (*g*). But where a statute, upon which power to make an order of justices was given, gave an appeal against the order, and a subsequent statute in *pari materiâ* varied the terms in which such order might be made, and further enacted that such order should be "final and conclusive," the appeal was held to be taken away (*h*). And where one of several Acts passed in *pari materiâ*, and incorporated together to be construed as one Act, contained a general appeal clause, and one of the subsequent Acts provided that on a fresh proceeding under that Act "the like proceedings" should be had, as under the former Act, these words were held to carry the right of appeal; thus, where proceedings were taken under the 27 & 28 Vict. c. 101, to obtain an order of justices directing that a highway should cease to be a highway repairable by the parish, and that Act was to be construed as one with the Highway Act, 1862, which latter Act was construed as one with the Highway Act, 1835, and the 27 & 28 Vict. c. 101, provided that the like proceedings should be had on obtaining such an order, as when application was made to stop up a highway under the Highway Act, 1835, by which last-mentioned Act an appeal was given, an appeal against the order under 27 & 28 Vict. c. 101, was holden to lie (*i*).

"Like proceedings."

It may be fit here to notice the distinction between appeals against the *orders* of justices, and those against their *convictions* and judgments.

The reason for noticing any distinction here between orders and convictions is for the purpose of observing that, speaking generally, less technical strictness is necessary respecting the former than the latter (*k*). Thus, in an order, it is not always necessary that it should appear on the face of the

(*f*) *R. v. Justices of Surrey* (1788), 2 T. R. 504; see *R. v. Skone* (1805), 6 East, 514; *R. v. Justices of Staffordshire* (1810), 12 East, 572.

(*g*) *R. v. Justices of Salop* (1831), 2 B. & Ad. 145; *R. v. Justices of Hants* (1830), 1 B. & Ad. 654; *R. v. Justices of Cumberland* (1822), 1 B. & C. 64.

(*h*) *R. v. Bedwell* (1854), 24 L. J. M. C. 17.

(*i*) *R. v. Justices of Surrey* (1869), L. R. 5 Q. B. 87. As to appeal given by one of several statutes in *pari materiâ*, which *quoad alia* were afterwards consolidated by a subsequent Act, see *R. v. Mayor of Liverpool* (1823), 3 D. & R. 275; *R. v. Nuisances Removal Commissioners of Middleton* (1858), 28 L. J. M. C. 40.

(*k*) *R. v. Middelhurst* (1757), 1 Burr. R. 399.

record that the defendant was summoned (*l*), which is absolutely necessary in the case of a conviction (*m*), except when his appearance renders it immaterial. So an order has been holden good in the case of removing goods to avoid distress under 11 Geo. 2, c. 19, when the offence was expressed in the alternative, "removed *or* concealed goods," &c.; whereas the same allegation in a conviction would be fatal to it (*n*); for, as was said by Lord Mansfield in one case (*o*), though in indictments and convictions the court is bound by a long succession of cases to require certainty to the greatest degree of technical precision, in orders more latitude is allowed; and if the record be substantially right, the court will intend that all the necessary formalities have been observed. Again, in a conviction all material facts necessary to support the conviction must be stated, but not so in the case of an order (*p*).

But many orders partook rather of the character of convictions for this purpose (*q*), and these remarks must now be taken subject to the provisions contained in the Summary Jurisdiction Rules, 1886, with respect to the forms of orders and summary convictions, which will be considered when we come to treat appeals against particular descriptions of orders, as well as against particular descriptions of convictions; and to the provision of 12 & 13 Vict. c. 45, s. 7, under which the order or conviction may be amended on appeal. We must now proceed to other matters respecting appeals in the abstract, and first of the parties to the appeal.

Parties to the appeal, who are.

Appellants may jointly appeal.

The parties to be made appellants are sometimes specifically pointed out by the Act which gives the appeal, and sometimes left at large under the general terms "parties aggrieved." Before considering the persons who have in various cases been held to fall within the latter words, it must be remarked, that parties may jointly appeal against a poor rate, whether they rely on the same, or separate grounds of appeal (*r*). Again, where a local Act gave an appeal against *any* rate or assessment, it was held that a party might, in one appeal, question several rates; though if the sessions should think that injustice would be done by hearing the appeal against the several rates jointly, they were at liberty, though not bound, to determine them separately (*s*).

(*l*) *R. v. Venables* (1724), 2 Ld. Raym. 1405.

(*m*) *R. v. Hawker* (1734), Cald. Ca. 391, n.

(*n*) *R. v. Sadler* (1787), 2 Chitt. R. 519; *R. v. North* (1825), 6 D. & R. 143; see *R. v. Pain* (1826), 7 D. & R. 678.

(*o*) *R. v. Middlehurst* (1757), 1 Burr. R. 359.

(*p*) *R. v. Justices of Cheshire* (1833), 5 B. & Ad. 439. The expression used by Denman, C. J., in this case was that in a conviction "evidence is set out." We understand this expression to have the meaning given to it in the text.—Eds.

(*q*) *E. g.*, *R. v. Rose* (1845), 15 L. J. M. C. 6 (bastardy).

(*r*) *R. v. Justices of Sussex* (1812), 15 East, 206; *R. v. White* (1792), 4 T. R. 771. So their notice of appeal may be joint.

(*s*) *R. v. Justices of Suffolk* (1818), 1 B. & A. 640.

Where an appeal is given to a party grieved, as for instance, by the Alehouse Licensing Act, 9 Geo. 4, c. 61, which enacted, sect. 27, that "any person who shall *think himself aggrieved* by any act of the justice done in execution of that Act, may appeal against such act to the quarter sessions," the party appealing must be a person *immediately* aggrieved: *e.g.*, in the case just put, by fine or refusal of licence to himself, and not consequentially only, as by the grant of a licence to a neighbour(*t*). A notice of appeal against an order for stopping a footway under 55 Geo. 3, c. 68, s. 3, stated that the appellant and his tenant, occupiers of a farm and lands near the said way, and who had heretofore used, and had a right to use it, and also other persons and the public would be put to great inconvenience by the stoppage. As it there sufficiently appeared that the result of stopping the way of necessity constituted that special and peculiar injury to the party, which entitled him to the privilege of appeal conferred by the Act, not on every captious person, but on parties "injured or aggrieved," it was held sufficient(*u*). Notices of appeal have been held bad because they did not describe the appellant as a person aggrieved(*x*); and in an appeal against a county rate, it was laid down that the appellant must either describe himself in the notice of appeal as a party aggrieved, or state that from which it follows of necessity that he is a party aggrieved(*y*). A pauper may himself appeal against the order for his removal as aggrieved by it(*z*). Under the old Highway Act, 13 Geo. 3, c. 78 (now repealed), any inhabitant might appeal against a bad appointment of a surveyor of the highways, for every inhabitant must be deemed to be aggrieved by it(*a*). But if parish officers are empowered to appeal, when they find that the parish is aggrieved, no appeal can be instituted by less than a majority, for they are to exercise a judgment before bringing it(*b*); but such an enactment only means to give an appeal to one who has legal ground for saying that he is aggrieved, that is to say, a person may so act as to preclude himself from objecting to what might otherwise be ground of appeal, as by himself authorizing and requiring the act to be done which he afterwards desires to appeal against; thus, where a local Act for rating purposes gave an appeal to any person who might think him-

Appellants,
who.

Party grieved.

(*t*) *R. v. Justices of Middlesex* (1832), 3 B. & Ad. 938.

(*u*) *R. v. Justices of Yorkshire (West Riding)* (1833), 4 B. & Ad. 685; and see *per* Abbott, C. J., in *R. v. Justices of Essex* (1826), 5 B. & C. 433.

(*x*) *R. v. Justices of Essex, sup.*; *R. v. Justices of Yorkshire (West Riding)* (1828), 7 B. & C. 678.

(*y*) *R. v. Blackawton (Inh.)* (1830), 10 B. & C. 792.

(*z*) *R. v. Hartfield* (1692), Carthew, 222.

(*a*) *R. v. Justices of St. Albans* (1825), 3 B. & C. 698; but see now 5 & 6 Will. 4, c. 50, s. 6.

(*b*) *R. v. Justices of Lancashire* (1822), 5 B. & A. 755; appeal by overseers on 18 Geo. 3, c. 19, s. 4, against allowing a constable's accounts.

Person
aggrieved.

self aggrieved by any rate or order, a ratepayer was held not entitled to appeal against an order for the payment of money out of rates made to carry out a resolution which he himself expressly authorized, and approved for the incurring of the expenses to meet which the order was made (*c*). But an appeal was allowed in the following case. An order of removal was directed to a parish, which being divided into two townships, each of which maintained its own poor, had no existence for the purpose of maintaining the poor. One of the townships was of the same name as the parish. The paupers were really intended to be removed to the other township, but the overseer of the latter township, seeing the order was addressed to the parish, refused to receive the paupers, who were then taken by the removing overseer to the churchwarden of the parish, who lodged the paupers in the workhouse of the township, and they were maintained by the township; it was held, that though the township was not bound to receive the paupers under the above order, yet there were reasonable grounds for the inhabitants of the township to think they might be fixed with the paupers if they did not appeal, and they were consequently entitled to appeal (*d*). Still, there should be an existing grievance to give the right of appeal, as where an appeal was given to persons "aggrieved by a judgment or determination of justices" by an Act relating to the removal of the poor, an order of removal cannot be appealed against if there has been no service of the notice of chargeability, for till such service there is no power of removal, and the time for appealing dates from such service, and service merely of the order of removal is a nullity (*e*). Such a body as turnpike trustees, who are empowered by a local Act to sue or be sued in the name of one of them, may appeal under the words "party grieved," and one of the body may give the notice of appeal and enter into the necessary recognizances on behalf of himself and his co-trustees, though not personally aggrieved (*f*). A corporation may be a "person" aggrieved (*g*).

Turnpike
trustees.

Corporation.

Respondents,
who.
When justices
parties.

The parties to whom the statute directs notice of appeal to be given are usually the respondents; but where the parties to whom notice of appeal is to be given are justices, it does not follow that they are parties to the appeal for the purpose of a liability for costs (*h*); and if the parties to whom notice of

(*c*) *Harrup v. Bayley* (1856), 25 L. J. M. C. 107.

(*d*) *R. v. Bishop Wearmouth (Inh.)* (1834), 5 B. & Ad. 942.

(*e*) *R. v. Recorder of Shrewsbury* (1853), 22 L. J. M. C. 98, overruling *R. v. Brixham* (1838), 8 A. & E. 375.

(*f*) *R. v. Justices of Surrey* (1833), 5 A. & E. 701, n.

(*g*) *Cortis v. Kent Waterworks Co.* (1827), 7 B. & C. 315.

(*h*) *R. v. Purdey* (1864), 34 L. J. M. C. 4 (vagrancy); *R. v. Smith* (1830), 29 L. J. M. C. 216 (vagrancy); *R. v. Justices of Hants* (1830), 1 B. & Ad. 654; *R. v. Goodall* (1874), L. R. 9 Q. B. 557 (molesting fellow workman).

appeal is to be given are not mentioned, then it seems that the party at whose instance, and for whose interest, the magistrate was called on to act, and in fact acted, as well as the magistrate or magistrates themselves, should be made respondents. But if the magistrate or magistrates acted without the prompting of any interested party, they should be made respondents (*i*). An inclosure Act allowed an appeal on giving the commissioner and the parties concerned ten days' notice in writing. It was held that these words meant parties directly interested in the soil, including among others the lady of the manor; and that for want of giving her notice of the appeal it could not be heard at sessions, or respited in order to a hearing there (*k*). Parties concerned.

The question of what sessions the appeal must be preferred to is discussed in the next section.

SECTION 2.

OF THE SESSIONS TO WHICH AN APPEAL MUST BE PREFERRED.

An appeal is not usually given by a statute to the next general sessions, if there be such holden distinct from the quarter sessions; but to the next quarter (or general quarter) sessions, as distinguished from other general sessions, and from special sessions (*l*). To what sessions.

The appeal must be to the sessions of the jurisdiction in which the order or the conviction is made, unless it is otherwise specially provided by statute: viz., from the orders and convictions of county magistrates to the county sessions, and from those of magistrates acting within a borough to the sessions for the borough (*m*). As to place.

The next quarter sessions means the next quarter sessions holden for the county at large, and not an adjournment thereof, and accordingly, where the quarter sessions were

(i) It seems that if two or more magistrates act together by a joint authority, notice to one would suffice: *R. v. Justices of Staffordshire* (1836), 4 A. & E. 844; *R. v. Sillivant* (1835), *id.* 354.

(k) *R. v. Justices of Lancashire* (1818), 1 B. & A. 630.

(l) *R. v. Justices of Middlesex* (1843), 4 Q. B. 807; *R. v. Justices of London* (1812), 15 East, 632. Where, in a borough being a county of itself, the only sessions (before 5 & 6 Will. 4, c. 76) were general sessions held twice a year, it was held that appeals against orders of removal must be tried at the next of those general sessions: *R. v. Justices of Carmarthen* (1821), 4 B. & A. 291.

(m) *South Molton case* (1685), Skinner's R. 122; *R. v. East Donyland (Ink.)* (1768), Burr. Sett. Cas. 592, which seems at first sight an authority to the contrary, was decided upon the special words of the statute giving the appeal.

holden at Lincoln for the county of Lincolnshire, and were then adjourned to Spalding for the more convenient dispatch of the business of the Spalding Division, an appeal given to the "next general quarter sessions," which might have been entered at Lincoln but was not, was held bad and not receivable at the adjourned sessions at Spalding (*n*). But where, for practical convenience, the county is divided into distinct divisions, and in each division a distinct court is held, so that all the questions locally arising within each division by practice belong to that division, and all the process for that division is returnable at the court for that division, and the panels of the jurors are made out for that division, and the rules of practice made by the court for each division for the conduct of business in it assume that the day when the court for that division begins its sittings is the first day of the sessions for that division, appeals may be entered at the court holden for the division in which the subject-matter of the appeal arises, although such court may be holden by adjournment from another division (*o*).

Where the appeal is given to the next (which means *next practicable*) quarter sessions, the question whether the next sessions were practicable is decided with reference to the day on which they commence, and the circumstance that they were continued by adjournment is disregarded, for the statute giving the appeal to the "next quarter session" does not contemplate the continuance of the sessions, but takes the holding of them as the point of time to which it refers the appeal, the sessions being always considered in law as one day, to whatever length they may be extended by accidental causes (*p*).

Against
orders of
removal.

Appeals against orders of removal of paupers from a parish within a borough, when made by justices of a borough not being a county of itself, were limited by 8 & 9 Will. 3, c. 30, to be prosecuted at the sessions for the county, division, or riding at large, and not otherwise or elsewhere. This was intended to prevent appeals *ab eodem ad eundem*, but since 5 & 6 Will. 4, c. 76, s. 105 (repealed and replaced by 45 & 46 Vict. c. 50), such appeals have been triable at the quarter sessions of the borough (*q*). And the union is now substituted for the parish by the 30 & 31 Vict. c. 106, and under the 27th section of that Act it has been held, that where a pauper becomes chargeable in a union, which includes a borough having a separate court of quarter sessions, the guardians may obtain an order for the removal of such pauper to his

(*n*) *R. v. Justices of Lincolnshire* (1824), 3 B. & C. 549; *R. v. Justices of Sussex* (1797), 7 T. R. 107.

(*o*) *R. v. Justices of Sussex* (1865), 4 B. & S. 966; see *R. v. Coystan* (1663), 1 Sid. 149.

(*p*) *R. v. Justices of Surrey* (1813), 1 M. & S. 479.

(*q*) *R. v. Justices of Shropshire* (1841), 2 Q. B. 85.

place of settlement from the justices of the borough, although the particular parish from which he is to be removed is not within the borough, and in such case the proper tribunal to hear an appeal against the order is the quarter sessions for the borough, and not the quarter sessions for the county (*r*); but an appeal against the decision of borough licensing justices refusing to renew a licence lies to the county sessions, and not to the recorder of the borough (*s*), the recorder being prohibited from granting licences by sect. 165, sub-sect. 4 (*c*), of 45 & 46 Vict. c. 50.

It had been decided under 16 & 17 Vict. c. 97, ss. 97—108, that an appeal against an order adjudging the settlement of a lunatic pauper confined in a borough asylum and obtained by a parish situate wholly within the same borough which had separate quarter sessions, and made by two justices of the same borough, lay to the county quarter sessions, and not to the borough sessions, under the 108th section (*t*); so, under the same Act and section, where such an order was obtained by the guardians of a union which was made up of parishes some of which were within a city, which, though in the county, had a separate quarter sessions, and some in the county without the city, it has been held that the appeal lay to the quarter sessions for the county, and not to the sessions of a borough in which the asylum was situate, inasmuch as the latter place of appeal was only in cases where the union or parish extended into several jurisdictions which meant counties, and not such a jurisdiction as the city in question (*u*); but how far these two last decisions may be affected by the 30 & 31 Vict. c. 106, s. 27, is a matter of some difficulty, for that section enacts, that where a union extends into several distinct jurisdictions, every matter, act, charge or complaint by which the guardians thereof are affected, or in which they have any interest, shall for the purpose of jurisdiction be deemed to arise or exist equally throughout the union (*x*).

The period within which an appeal is to be preferred is generally pointed out by the statute which gives it; but when it is not, the rule is, that it must be preferred within a reasonable time (*y*). Where a public general Act gave a remedy by appeal to sessions, without limitation as to time of appealing,

(*r*) *R. v. Justices of Staffordshire* (1872), L. R. 7 Q. B. 288.

(*s*) *R. v. Deane* (1841), 10 L. J. M. C. 126; *R. v. Cockburn* (1854), 24 L. J. M. C. 43.

(*t*) *R. v. Justices of Warwickshire* (1859), 28 L. J. M. C. 249; see also, under 8 & 9 Vict. c. 126, *R. v. Justices of Lancashire* (1849), 18 L. J. M. C. 121.

(*u*) *R. v. Justices of Kent* (1866), 35 L. J. M. C. 201.

(*x*) And see *R. v. Justices of Staffordshire*, *sup.*

(*y*) *R. v. Justices of Oxfordshire* (1813), 1 M. & S. 448. See *R. v. Trafford* (1850), 15 Q. B. 200, *sub nom. R. v. Justices of Lancashire* (1850), 19 L. J. M. C. 199.

this power was held to override a clause of appeal in a previous local Act, by which a time was limited after which no such appeal could be made (z). Where a certain time is given within which a party may appeal, the intention is to give the whole of that time for the exercise of his judgment as to whether he will appeal or not, and therefore he has that limit of time within which he may signify his intention of appealing by giving notice of appeal, and is not required to lodge the appeal, or bring it on to be heard within that time; thus, where a statute made it lawful for a person convicted by justices "within three calendar months after such conviction to appeal," an appellant was held to be in time, who was convicted on the 2nd of January, gave notice of appeal on the 29th of March, for the sessions which were held on the 13th of April, when the appeal was ordered by the sessions to be heard on the 17th of April, and was called on after an adjournment on the 29th of April, though there had been a quarter sessions held on the 13th of January (a).

When appeal to be within three calendar months after conviction.

When appeal to be to a quarter session holden within six months.

But where an appeal was given by statute to "any quarter session, to be holden *within* six months after the conviction, on condition of the appellant giving ten days' notice of his intention to appeal, and entering into recognizance four days after such notice," and an appeal lodged within the time was dismissed at the hearing for want of proof of the proper recognizance, it was held that the right to appeal was gone, and that the appellant could not lodge a second appeal, though within the six months; the court saying that the first judgment on the formal objection was conclusive, and that the sessions could not take cognizance of a second appeal on the same subject. The appellant might indeed have stopped his first appeal from being heard at all, when he discovered his deficiency of proof, and might have lodged a second within the limited time, giving fresh notices, and being prepared with proof of entering into recognizance to prosecute that second appeal: but having proceeded to judgment he was concluded (b). The statute 16 Geo. 3, c. 30, gave an appeal to the "sessions next after the expiration of twenty days from the time of conviction"; but the person so appealing was required to give six days' notice, and to enter into a recognizance. On the hearing of the appeal, the respondents objected that no notice was proved according to the Act. The magistrates doubted, and adjourned the appeal to the next sessions, when they allowed the objection, and dismissed the

(z) *R. v. Justices of Bucks* (1827), 7 B. & C. 3; appeal against a county rate on 55 Geo. 3, c. 51, s. 14. The local Act was 54 Geo. 3, c. 103.

(a) *R. v. Justices of Middlesex* (1817), 6 M. & S. 279; *R. v. Justices of Essex* (1864), 34 L. J. M. C. 41 (an appeal under sect. 63 of the General Inclosure Act, 8 & 9 Vict. c. 118).

(b) *R. v. Justices of Yorkshire (West Riding)* (1790), 3 T. R. 776.

appeal. A rule for a mandamus (*c*) having been obtained to compel them to enter continuances to their next sessions, and to hear it, Lord Ellenborough said that the entering into recognizance, and giving six days' notice, were both made by the Act conditions precedent; so that if either had not been complied with, the appeal could not be duly entered, and unless duly entered could not be legally adjourned. Le Blanc, J., added that it would be nugatory for the court to order continuances of that which the parties had no right originally to bring before the sessions in the first instance, for want of compliance with a material condition which gave that right.

Most statutes limit the appeal to the "*next session*"; words which, unaccompanied by more express directions, have occasioned much controversy with respect to the moment from which the time for entering an appeal begins to be reckoned. Generally speaking, in the absence of more explicit provision, the terms "*next session*," or "*next quarter session*," mean the next possible or practicable session after the arising of the cause of appeal—whether that be, *e.g.*, the execution of an order of removal by the actual removal of the pauper to the parish to be charged (*d*), the publication of a poor's rate (*e*), the render of their accounts by parish officers to their successors (*f*), or a conviction (*g*)—at which session an appeal, effectual with respect to the preliminaries of sufficient notice, recognizance, &c., can be lodged, not for respite or adjournment only, but for hearing. For it is obvious that the next actual sessions may often happen so soon after the necessity for appealing arises, that appellants would not have a reason-

"Next sessions," what.

(*c*) *R. v. Justices of Oxfordshire* (1813), 1 M. & S. 446; and see *R. v. Justices of Lincolnshire* (1824), 3 B. & C. 548.

(*d*) *R. v. Justices of Surrey* (1813), 1 M. & S. 479; *R. v. Justices of Essex* (1817), 1 B. & Ald. 210. Only one clear working day, exclusive of Sunday, intervened in those cases, between the execution of the order of removal and the next immediate quarter sessions. So also in *R. v. Justices of Yorkshire (East Riding)* (1772), Dougl. 192. The appellant parish was in this case sixty miles distant from the sessions town, and the sessions commenced the next day after the act complained of. In *R. v. Justices of Herefordshire* (1789), 3 T. R. 504, the court of King's Bench refused a mandamus in a case in which the cause of appeal happened on the 19th, and the sessions were held on the 22nd, the appealing parish being distant twenty miles from the sessions town. But four days was held too short a time for appealing in *R. v. Justices of Flintshire* (1797), 7 T. R. 200. The same rule prevails where irregular service of the order of removal is the ground of appeal against it: *R. v. Penkridge* (1832), 3 B. & Ad. 538.

(*e*) *R. v. Hendon* (1822), 2 D. & R. 249; *R. v. Justices of Sussex* (1812), 15 East, 206, in both of which cases only one day intervened between the publication of the rate and the sessions.

(*f*) *R. v. Thackwell* (1825), 4 B. & C. 62; *R. v. Justices of Dorsetshire* (1812), 15 East, 200.

(*g*) *Proser v. Hyde* (1786), 1 T. R. 414; *Re Blues* (1855), 24 L. J. M. C. 138.

able time to consider, in the first instance, whether they should appeal or not, or, next, to prepare for trial by searching for evidence, giving the proper notice of appeal, drawing briefs, &c. If, however, all that takes place at the first practicable session is not all that the appellant could have done, and will not put him in a condition to be then heard, *e.g.*, if he has not given the proper notices, and only offers to enter an appeal for hearing at a still subsequent session, the quarter sessions have no jurisdiction to receive the appeal (*h*).

The next sessions for appealing against an overseer's account are the next practicable sessions after the accounts have been published, that is, after they have been deposited with the churchwardens and overseers for public inspection, and the fact of depositing *bonâ fide* made known (*i*).

It was formerly held in the case of an appeal from an order of removal under 13 & 14 Car. 2, c. 12, s. 2, which gives to parties who "think themselves aggrieved by any such judgment of the justices" an appeal to the next quarter sessions, that if two working days, including the first day of the next session, intervened after the execution of the order, the appeal should have been lodged or entered at that session, though there had not been sufficient time before it to give reasonable notice of appeal, so as to try it there; for it was said it might have been then adjourned (or respited) to the next session, according to 9 Geo. 1, c. 7, s. 8 (*k*). But this is now decided otherwise, and the entering an appeal merely for the purpose of having it adjourned is treated as a useless, and therefore an unnecessary, act. It is now sufficient to enter it at the sessions at which the appellant, by his notice, is bound to try it, in order to make it imperative on that sessions to hear it (*l*). So that when an order of removal is served on a day within the time required by the practice of sessions for giving notice of appeal at the then next sessions, the appeal need not be entered at those sessions, but is in time if lodged at the next following (*m*); but the appellant cannot by his negligence or dilatory conduct make those

(*h*) *R. v. Justices of Yorkshire (West Riding)* (1815), 4 M. & S. 327.

(*i*) *R. v. Watts* (1837), 7 A. & E. 461; *R. v. Thackwell* (1825), 4 B. & C. 62.

(*k*) *R. v. Justices of Herefordshire* (1739), 3 T. R. 504; *R. v. Justices of Yorkshire (West Riding)*, *sup.*

(*l*) See *R. v. Justices of Southampton* (1829), 6 M. & S. 394; *R. v. Justices of Kent* (1828), 8 B. & C. 639; *R. v. Justices of Devon* (1829), *id.* 640, n., and *post*, Chap. V., as to appeals against orders of removal. It was said, in *R. v. Devon*, that the result of the above decision would be, that a removing parish might not know of the intention of the other parish to appeal till eight days before the second sessions. Lord Ten-terden said that the quarter sessions might remedy that inconvenience, should it prove one, by requiring under such circumstances a longer notice.

(*m*) *R. v. Justices of Surrey* (1845), 3 D. & L. 343.

sessions impracticable which were in fact practicable (*n*). So that if he chooses to take all the time allowed him by the 11 & 12 Vict. c. 31, s. 9, for giving notice of appeal and sending grounds, and by so doing is too late for a sessions which otherwise he might have been in time for, he must show his intention of prosecuting the appeal by entering it at the sessions which he has rendered impracticable (*o*); but whether the sessions are the first practicable is a question of fact for the sessions or recorder. The court will review the decision of the sessions or recorder upon the facts and dates relied upon to show that the sessions were or were not practicable, and if the sessions hold a previous sessions not to have been practicable and enter an appeal at a subsequent one, the court, if they think the previous sessions were practicable, will grant a writ of prohibition to the sessions as to the appeal entered (*p*).

Where a statute gave to a party "grieved by the judgment of any justice" an appeal to the "next quarter sessions," these words were held to designate the sessions next after the conviction, and not those next after the execution or levying the penalty thereon; for the conviction, and not the execution, is the grievance to the party (*q*).

Next after the "judgment."

Where an Act limited the right of appeal, upon giving notice thereof "within six days after the cause of the complaint arises," it was determined the appeal was in time if brought within six days after the levy, although more than that time had elapsed since the issue of the warrant, Lord Ellenborough saying: "It is not necessary that he should appeal on the warrant; for *non liquet* that it would be proceeded upon" (*r*). Where, under the Turnpike Act, 4 Geo. 4, c. 95, s. 87, justices ordered the surveyor of a township to perform certain statute duty on a turnpike road, and to pay the turnpike surveyor part of the composition, it was held that the order of the magistrates was not complete till the surveyor of the township was in possession of the order; and that the cause of complaint arose when the order was served; so that the sessions were bound to hear an appeal of which notice had been given six days after such service. Bayley, J., observed that parties are often present in court when rules

Next after "cause of complaint arises."

(*n*) *R. v. Justices of Sussex* (1865), 34 L. J. M. C. 69; *R. v. Justices of West Riding of Yorkshire* (1858), 27 L. J. M. C. 269; and see *R. v. Sevenoaks* (1845), 14 L. J. M. C. 92; *R. v. Skircoat* (1859), 28 L. J. M. C. 224.

(*o*) *R. v. Justices of West Riding*, *sup*.

(*p*) *Liverpool Gas Co. v. Overseers of Everton*, &c. (1871), L. R. 6 C. P. 414 (six days, within which to consider whether notice of appeal should be given, held sufficient to render sessions practicable).

(*q*) *Proser v. Hyde* (1786), 1 T. R. 414.

(*r*) *R. v. Justices of Devon* (1813), 1 M. & S. 411; decided on 13 Geo. 3, c. 78, s. 80, the old Highway Act, now repealed.

are pronounced, but are not bound to take notice of them till they are served. The surveyor may or may not be present when this order is made; and it is desirable that the practice should be uniform whether he does or does not attend (s).

Cause of complaint under Inclosure Act.

An Act for the inclosure of certain lands in Middlesex contained a clause giving an appeal "within six months from *the time when the cause of complaint shall have arisen*." The commissioner at a meeting under the Act, on 18th June, 1818, showed the map to the appellant, with *the allotment marked out upon it*, which he, the commissioner, had assigned to him, the appellant. The latter raised some objections to it, and desired the commissioner to reconsider it. He did so, but did not think fit to make any alteration, and, having received no further application, on 28th August following sent a formal notice to the appellant that the land remained allotted to him according to the map exhibited to him on 18th June previous, and on the same day the said allotment was accordingly *staked out* by command of the said commissioner. According to the local Act, as well as the general inclosure Act, no allotment ought to be *made*, till the roads have been *set out*; and the roads in this case could not be *staked out* till the end of July, because the crops were on the ground. The appeal was lodged on 9th January, and respited till the 29th April, when it was opposed on the ground of not having been lodged *in time*, *i.e.*, within six months from the *cause of complaint arising*; and the justices dismissed the appeal on this ground; but the court above granted a mandamus to them to hear the appeal, being of opinion that there was no actual setting out of the allotment according to the true construction of the Act, till something was actually done founded on the plan (t).

It seems to follow, from *Farrer v. Billing* (u), that, at least in cases where the provisions of a local inclosure Act conform to and do not contradict or supersede those of the general inclosure Act, the grievance or foundation of appeal arises at that point of time when the allottee has notice of the portion allotted for him on the map by the commissioners, whether he obtains that knowledge from a map, or by staking out, or in any other manner. A local inclosure Act gave an appeal to parties *grieved*, by anything done in pursuance of the Act, to "any general quarter sessions holden for the county within four calendar months next after *the cause of complaint shall have arisen*." An allotment was made and staked out by the commissioners in March, and the appellant cropped it. It

(s) *R. v. Justices of Lancashire* (1828), 8 B. & C. 593. See *R. v. Nuisances Removal Committee of Middleton* (1858), 28 L. J. M. C. 41.

(t) *R. v. Justices of Middlesex* (1819), 1 Chitt. R. 367. See *R. v. Nockolds* (1834), 1 A. & E. 245.

(u) (1818), 2 B. & A. 171.

was held that though the mere staking out the ground might not be a grievance, as it might be done without notice to the party, yet his cropping it showed him too late in lodging his appeal at the October session (x).

In a private inclosure Act, power was given to the commissioners to set out land in a certain proportion in lieu of tithes to the vicar, with the following clause of appeal:—"And if any persons shall think themselves aggrieved by *any thing done* in pursuance of this Act, they may appeal to any general quarter session of the peace for the county, &c. within six calendar months *after such cause of complaint shall have arisen.*" The commissioners made an allotment upon the map, which the vicar inspected in November, 1812, and appointed an agent who attended a subsequent meeting, when an alteration was made which such *agent approved*, and it was understood at the meeting where such agent so concurred, that all objections were reconciled, and the allotments definitely settled. In November, 1813, the commissioners gave notice that all tithes were to cease from the 29th of September last preceding. The vicar entered an appeal against the allotment at the Epiphany sessions, 1814, being within six calendar months from the *date of the notice* of the commissioners above mentioned; which appeal was dismissed as being out of time, the question being from what period the "grievance commenced." But the Court of King's Bench were of opinion that *the notice of the commissioners of the time from which the tithes were to cease*, was the commencement of the vicar's grievance, and therefore that the appeal was in time (y). But a very different view was taken in *R. v. Justices of Bucks* (z), where Lord Ellenborough said "A person may be said to be aggrieved by the inclosure by virtue of an inquisition before the inclosure is actually made. The order to inclose under the inquisition is a grievance. An order which arms another with a power to stop up or inclose is a grievance in point of law to him whom the inclosure or stoppage would aggrieve by the very authority which it confers."

By a local Act, certain guardians, &c. of the poor were incorporated and ordered to hold courts at which ratepayers might object to their proceedings, and if the matter could not be then settled, it was to be adjourned to the next court, to be then "*finally heard and determined.*" By another clause, any person aggrieved by any thing done in pursuance of the Act, "and for which no *further mode of relief* was already appointed," might appeal to the quarter sessions to be holden within four calendar months next after the "*cause of com-*

(x) *R. v. Justices of Wilts* (1811), 13 East, 353.

(y) *R. v. Justices of Gloucestershire* (1814), 3 M. & S. 127; and see *R. v. Nockolds* (1834), 1 A. & E. 245.

(z) (1813), 2 M. & S. 233.

plaint should have arisen." The guardians ordered certain payments to be made for sums due on annuities and interest on loans previously granted and incurred. A ratepayer appealed within four months after the date of their order. Held, that the borrowing the money and granting the annuities were not the "cause of complaint," but the being burdened in respect of the payments by the making of the order; and the sessions were ordered to hear the appeal (z).

So, under the Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), s. 22 (repealed), where an appeal was given against the amount of an assessment under that section, the person aggrieved first giving notice of appeal with grounds within fourteen days after such assessment should have been made, or cause of complaint should have arisen, notice of appeal was held to be given in time, if given within fourteen days after notice of the assessment left on the premises, though more than fourteen days after the assessment was made (a).

Next after
orders or pro-
ceedings had.

An Act gave an appeal against orders of justices for stopping up roads "to the parties *aggrieved* by any such order or proceeding, to the next quarter sessions *after any such orders or proceedings had*;" and the question was the precise period from which the grievance was to be estimated, and whether the *terminus a quo* for an appeal was to be reckoned from the time of the order or from that of the actual stoppage in consequence of it, and the court held the former. Lawrence, J., said that on the construction of the Act as to the time of appealing, he saw no other line to go by, as otherwise it would be difficult to say to what period an appeal might be deferred (b); a principle adhered to, and illustrated by Lord Ellenborough in a subsequent case on the same Act (c). Where an appeal is given from an order or *proceeding*, proceeding means *prima facie* a legal proceeding and not an act done pursuant to the order (d). In the cases mentioned in the footnote, the time for appealing against an order made by justices was held to run from the time when the order was pronounced in court, and not from the time when formal service of the order was effected upon the appellant (e).

(z) *R. v. Justices of Salop* (1831), 2 B. & Ad. 145.

(a) *R. v. Middleton Nuisances Removal Commissioners* (1858), 28 L. J. M. C. 41.

(b) *R. v. Justices of Pembrokeshire* (1802), 2 East, 212, 213; decided on 13 Geo. 3, c. 78, s. 19.

(c) *R. v. Justices of Bucks* (1813), 2 M. & S. 229. See *Ex parte Simpkin* (1859), 29 L. J. M. C. 23.

(d) *R. v. Justices of Bucks*, *ubi sup.*

(e) Order under Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121) (repealed): *Ex parte Simpkin*, *sup.*

Bastardy order against putative father, under 7 & 8 Vict. c. 101, s. 4: *Ex parte Johnson* (1863), 32 L. J. M. C. 193.

Order for payment of money out of highway rate for repair of turnpike road, under 4 & 5 Vict. c. 59 (repealed): *R. v. Justices of Derbyshire* (1845), 14 L. J. M. C. 84.

An Act gave an appeal to any person aggrieved by any *act done* under it. A party grieved applied to a special sessions for an order under the Act, who, after hearing the case and evidence, dismissed the complaint on a supposed want of jurisdiction. The court held this to be an *act done* against which an appeal would lie (*f*). The cases decided upon the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), and, before that Act, upon the numerous statutes *in pari materiâ* therewith, and repealed thereby, may sometimes be usefully referred to as to what is deemed to be "an act done." Appeal against "act done."

A local Act vested the management of the parish poor in the churchwardens and others, and gave an appeal to them by any person thinking himself *aggrieved* by anything to be done by virtue of the Act, and if he should not be satisfied with their *determination*, then gave an appeal to the quarter sessions. A parishioner applied for relief against a poor rate to the churchwardens, &c., who, at a meeting, resolved to take no further notice of his application; the Court of King's Bench held that as the churchwardens, &c. had not come to any *determination* on the subject-matter of the complaint, the remedy was by mandamus to them to hear the appeal; and an appeal to the sessions was held mistaken (*g*). "Determination."

Where a local Act gave an appeal against a rate, first to a borough sessions, and then against their order to the county sessions, the appellant was confined to the original grounds of appeal urged at the borough sessions, though he might bring forward additional evidence (*h*).

SECTION 3.

OF THE STEPS PRELIMINARY TO THE ENTERING AN APPEAL FOR HEARING; AND HEREIN OF NOTICES OF APPEAL GENERALLY.

By some statutes (formerly more common than at present) it is made a part of a magistrate's duty to acquaint the party whom he convicts of his right of appealing, and also to inform Duty of justices to inform a party of his right to appeal.

Order stopping up a road, under 13 Geo. 3, c. 78, s. 19 (repealed). *R. v. Justices of Staffordshire* (1802), 3 East, 151. Where the procedure involved two orders, the first sanctioning the making of a new footway in lieu of an old one, and the second stopping up the old one, time was held to run from the second, though, doubtless, an appeal would also have lain from the first order also. *R. v. Justices of Herts* (1815), 3 M. & S. 459, decided on the same statute.

(*f*) *R. v. Tucker* (1824), 3 B. & C. 544. This proceeded on peculiar wording of an Act.

(*g*) *R. v. Justices of Kent* (1829), 9 B. & C. 283.

(*h*) *R. v. Justices of Suffolk* (1818), 1 B. & A. 640.

him of the necessary steps to be taken. In convicting on such statutes, if the justices neglect this duty, as, if the statute requires both a recognizance and notice in writing of appeal to be given to the justices, and the justices inform the party convicted of his right to appeal, and receive his recognizance, but are silent as to the notice, the appellant is discharged from the obligation of giving such notice to the justices, and the session is bound to receive his appeal (*i*). The necessity for informing the party that he must give notice of appeal may, however, be waived: as, where a party being informed of his right of appeal stated that he did not intend to appeal, but afterwards appealed, his appeal was dismissed for want of notice at the time of his conviction that he intended to appeal upon the ground that by intimating his intention not to appeal he released the justices from the duty which they would otherwise have been under to give him further information (*k*).

Notice of
appeal, when
necessary.

The statutes which grant an appeal from the order or conviction of justices, commonly annex certain conditions precedent to the taking advantage of that privilege, *e.g.*, the giving notice to them, and entering into recognizance to prosecute the appeal. Where this is the case, the directions of the legislature must be strictly complied with before entering the appeal; and no contrary practice of the sessions will avail (*l*). And if without the giving of the requisite notice of appeal, an appeal is entered and respited, and, in accordance with a practice of the sessions, a notice of trial of the respited appeal is duly given, the appeal cannot nevertheless be heard, because it never was duly entered (*m*).

Where it was enacted by 50 Geo. 3, c. 48 (repealed), that any party aggrieved by a conviction under that Act who should enter into a recognizance to appear at the next sessions should be at liberty to appeal to such sessions, it was held that no notice of appeal was necessary to be given, and that if the appellant duly entered into the recognizance, the sessions were bound to hear his appeal (*n*).

But, referring to this decision, Lord Campbell, with the entire concurrence of Coleridge, J., in *Re Blues* (*o*), said: "We wish that it should not be supposed that the court acquiesce in the rule said to be laid down by Bayley, J., in *R. v. Essex JJ.* (*n*), that if an Act of Parliament giving an appeal against a conviction does not prescribe a notice in terms, there is no occasion to give notice of the appeal to the opposite party. It will be found that Bayley, J., does not lay down

(*i*) *R. v. Justices of Leeds* (1792), 4 T. R. 583.

(*k*) *R. v. Justices of York (West Riding)* (1815), 3 M. & S. 493.

(*l*) *R. v. Justices of Lincolnshire* (1824), 3 B. & C. 548.

(*m*) *R. v. Justices of Oxfordshire* (1813), 1 M. & S. 416.

(*n*) *R. v. Justices of Essex* (1821), 4 B. & A. 276.

(*o*) (1855), 24 L. J. M. C. 138.

such an universal rule. In the case in which he was giving his decision the appeal was given on the express condition of entering into a recognizance; and he places weight upon that, and supposes that, the legislature having enacted that recognizances were to be entered into, the opposite party might obtain information respecting the recognizance and know when the appeal was coming on. But where an Act simply gives a power of appeal without any condition being mentioned, this reason does not apply. It is necessary that notice should be given to the other party before the appeal can be heard. If he gives the other side information in any way, on which the other side may act, that may be sufficient notice; but if he in no manner gives information to the opposite side, so that they may be prepared to oppose his appeal, I do not think that he is entitled to have it heard. According to the principles of natural justice and common sense a person must not appear to acquiesce in the conviction, and then reverse it on appeal behind the back of the other side, that other side knowing nothing whatever, and having no reason to suppose that there would be any appeal. Therefore, however it may be in such a case as *R. v. Essex JJ.*, where the Act contains an express condition upon which the appeal is given, I am of opinion that, where an appeal is given simply, there is an implied condition that before the hearing notice should be given to the other party, so that both may be heard and justice done."

In *R. v. Kent JJ.* (*p*), which was decided before *R. v. Essex JJ.*, the decision in which was precisely to the same effect as the decision in that case, the decision proceeded upon the ground that under the statute there in question the informer was entitled to half the penalty imposed by the conviction, and it was accordingly considered to be his business to follow up the conviction, in which case he could not fail to discover that the person convicted had entered into the recognizance. Although this point is not mentioned in the report of *R. v. Essex JJ.*, reference to the statute upon which the conviction in that case took place (50 Geo. 3, c. 48, s. 17) will show that in that case also, as in *R. v. Kent JJ.*, the informer was entitled to half the penalty imposed by the conviction; and this circumstance explains Bayley, J.'s expression: "The informer must have known that it was the intention of the party convicted to appeal, and any further notice was therefore unnecessary."

It is submitted that upon the special ground above pointed out, *R. v. Kent JJ.* and *R. v. Essex JJ.* may be treated as having been well decided, but that they cannot be regarded as of authority except in the case of a statute giving a portion of the penalty to the informer.

The sessions cannot, by a rule of practice, require a notice of appeal against an order or conviction of justices out of sessions to be served on every justice who is a party to it, if the Act which gave the appeal does not direct such a notice; for that would be to introduce a new condition of appeal not to be found in the Act (*q*).

Notice, an implied condition—when.

Where an Act requires notice of appeal to be given, without providing that the notice must be in writing, a verbal notice will suffice in cases not included within the 12 & 13 Vict. c. 45, s. 1, *infra*, and s. 2, *post*, p. 439; and this, though the notice prescribed by the statute is “reasonable notice,” for the word “reasonable” will be held to refer to the time of the notice, and not to the manner of giving it (*r*). Where notice is made a condition of appealing, without more being required, it is more convenient to give it in writing, as being better capable of proof by an examined copy, and is now required by 12 & 13 Vict. c. 45, s. 1, in all cases except those mentioned in sect. 2. It need scarcely be added, that where an Act requires a written notice, no oral notice will suffice; but a printed form of notice signed by the appellant, after being properly filled up, would (*s*).

Written or verbal.

Time for giving notice. Reasonable time.

Again, though the magistrates composing a court of quarter sessions certainly have a discretion to exercise with respect to what is “reasonable time” for giving notice of appeal, or of the appellant’s intention to proceed to the trial of a respited appeal, the King’s Bench Division has also a kind of visitatorial jurisdiction over them in the exercise of their discretionary power, and will interfere and correct it when it ought not to be given effect to (*t*); but the 12 & 13 Vict. c. 45, was

(*q*) *R. v. Justices of Staffordshire* (1836), 4 A. & E. 842, on 53 Geo. 3, c. 127, s. 3.

(*r*) *R. v. Justices of Salop* (1821), 4 B. & A. 626, decided on *Bastardy Act*, 49 Geo. 3, c. 68. See also *R. v. Justices of Surrey* (1822), 5 B. & A. 539.

(*s*) See *per* Le Blanc, J., in *Schneider v. Norris* (1814), 2 M. & S. 286; recognized in *Durrell v. Evans* (1862), 31 L. J. Ex. 337. See also *R. v. Fletcher* (1861), 31 L. J. M. C. 206; also *Saunderson v. Jackson* (1800), 2 B. & P. 238, and *Strickland v. Maxwell* (1834), 4 Tyr. 346. As to notices of appeal against poor rates, see *post*, Chap. IV., and against orders of removal, *post*, Chap. V.

(*t*) *Per* Lord Ellenborough, in *R. v. Justices of Wilts* (1808), 10 East, 404. There, an appeal of which due notice had been given to the respondents was respited under 9 Geo. 1, c. 7, s. 8. By a rule of practice promulgated after the sessions at which the appeal was respited, it was required that in the case of respited appeals, notice of trial should be given on or before the Monday in the week next before the sessions, or that it should be deemed insufficient. The appellant’s attorney was ignorant of this rule, and gave notice of trial according to the former practice, for the sessions to which the appeal was adjourned; they dismissed the appeal without hearing it, on account of insufficient notice, and held that they had no power to adjourn the appeal again even on payment of costs of the day. A mandamus issued to them to hear it. As to the validity of rules of practice of sessions, see *post*, p. 451.

passed for the purpose of making the law more uniform in these respects, and consequently the cases are much reduced in number in which magistrates are called upon to exercise their discretion. By sect. 1, in every case of appeal (except as hereinafter mentioned) to any court of general or quarter sessions, fourteen clear days' notice of appeal at least shall be given, and such shall be sufficient notice, any Act or Acts, or any rule or practice of any court or courts to the contrary notwithstanding; and such notice of appeal shall be in writing, signed by the person or persons giving the same, or by his, her, or their attorney, on his, her, or their behalf, and the grounds of appeal shall be specified in every such notice. Provided always, that it shall not be lawful for the appellant or appellants on the trial of any such appeal to go into or give evidence of any other ground of appeal besides those set forth in such notice (*u*). By sect. 2, none of the provisions hereinbefore contained as to notices of appeal are to affect or alter the law as to notice of appeal against (1) a summary conviction, (2) an order of removal, (3) an order under any statute relating to pauper lunatics, (4) or an order in bastardy, (5) or against any proceeding under or by virtue of any of the statutes relating to the excise, customs, stamps, taxes or post office. Under very special circumstances the person entitled to notice of appeal may so act as to estop himself by conduct from setting up the want of such notice. The case of justices omitting to acquaint the appellant at the time of his conviction with his duty to give notice of appeal, as required of them by statute, which is one such case, has already been referred to (*x*). In another case, when an appeal against a poor rate was called on, it was respited at the instance of the respondents, upon the ground that they had not had sufficient time to prepare their defence to the matters stated as grounds of the appeal. The appellant opposed the respite. Notice of appeal was neither proved nor expressly admitted. It was held that at the following sessions the appellant was entitled to be heard without proving any notice of appeal (*y*).

Notice under Baines' Act.

Time for giving must be in writing.
How signed.

Grounds of appeal.

Exceptions.

Where a statute requires a notice of appeal to state certain particulars, but provides that the respondents by consent, given in a certain specified manner, may dispense with such particulars, such statute may be interpreted to preclude the possibility of waiver by consent given in any other manner than that prescribed (*z*).

We have seen that compliance with an Act, in giving the

(*u*) 12 & 13 Vict. c. 45, s. 1.

(*x*) *R. v. Justices of Leeds* (1792), 4 T. R. 583, *ante*, p. 436.

(*y*) *R. v. Justices of Hertfordshire* (1833), 4 B. & Ad. 561.

(*z*) *R. v. Sheard* (1824), 2 B. & C. 856, decided on 41 Geo. 3, c. 23, ss. 4 and 5.

requisite notice of appeal, will not entitle the appellant to enter, or the sessions to hear, an appeal, if the entering into a recognizance was also made by the Act a condition precedent, but was not complied with (*a*); and this rule applies, *à fortiori*, where neither the notice nor recognizance made necessary by the statute had been given, notwithstanding the practice of the sessions to dispense with them where it was only sought to enter and respite the appeal to the ensuing session (*b*).

If a statute points out the length of time within which a notice should be given before any appeal, its provisions must be strictly obeyed, and cannot be infringed by any practice of sessions. "Ten days' notice" means ten days, exclusive, as it would seem, of the first day, and the other inclusive (*c*). But "ten *clear* days' notice before the sessions" means a notice of ten perfect intervening days between the act done, *e.g.*, the service, and the first day of the sessions; and a service of a notice of appeal, exclusive of the first and including the last day, for the 19th, that being the first day of the sessions, was accordingly held insufficient (*d*).

"Fourteen days' notice *at least*," in the Lord's Day Act, has been held to mean fourteen *clear* days (*e*). And fourteen clear days is the expression used in 12 & 13 Vict. c. 45, s. 1, as above set out. In computing the number of days, Sunday is to be reckoned, though it be the last; and in such case notice of appeal must be given within the number fixed by the Sunday (*f*). But if the time limited is only twenty-four hours, *semble* Sunday must be excluded (*g*). "*Immediate*" notice of an appeal was required by 1 Geo. 4, c. 56, s. 5 (now repealed). The court held that a notice, not given till seven days after the date of the conviction, was not prompt enough to justify the sessions in entertaining the appeal, but they

Ten days' notice.
Ten clear days' notice.

Fourteen days at least.

Immediate.

(*a*) *R. v. Justices of Oxfordshire* (1813), 1 M. & S. 446.

(*b*) *R. v. Justices of Lincolnshire* (1824), 3 B. & C. 548.

(*c*) *R. v. Justices of Yorkshire (West Riding)*, *In re Bower* (1833), on 55 Geo. 3, c. 68, s. 3, a case of stopping a way: 4 B. & Ad. 685; relied on *per curiam* in *R. v. Goodenough* (1835), 2 A. & E. 465; and any rule of sessions practice to the contrary, *e.g.*, exclusive of both days, would be controlled by the Court of King's Bench: *R. v. Justices of Yorkshire* (1833), 5 B. & Ad. 667; *R. v. Justices of Staffordshire* (1836), 4 A. & E. 842; *R. v. Justices of Lancashire* (1828), 7 B. & C. 691. However, in a later case, where the practice of sessions required fourteen days' notice of trying a respited appeal, and the sessions refused to hear the appeal for want of such notice, Patteson, J., refused a mandamus: *R. v. Justices of Monmouthshire* (1835), 1 H. & W. 111.

(*d*) *R. v. Justices of Herefordshire* (1820), 3 B. & A. 581.

(*e*) *Zouch v. Emmscy* (1821), 4 B. & A. 522; and see *Re Prangley* (1836), 4 A. & E. 781.

(*f*) *R. v. Justices of Middlesex* (1843), 2 Dowl. N. S. 719; *Ex parte Simpkin* (1859), 29 L. J. M. C. 23; *R. v. Justices of Lancashire* (1852), 16 Jur. 1067, n.

(*g*) *R. v. Justices of Middlesex* (1848), 17 L. J. M. C. 111.

would not say that "immediate" must be construed so strictly as to require the notice to be given *forthwith* on conviction (*h*). The word "immediately" has been held to mean within a reasonable time with reference to entering into recognizances (*i*).

Where an Act gave an appeal from an order for the payment of money upon giving notice of appeal "within six days after such order shall be made or given," the time for notice of appeal has been held to run from the making of the order, and not from the service of it (*k*). So notice of appeal against a bastardy order under 7 & 8 Vict. c. 101, s. 4, which must be given "within twenty-four hours after the adjudication and making of any order on the putative father, &c.," must be within that time of the verbal adjudication and order made at petty sessions, and not from the time of its being signed or service of the written order (*l*). So appeals from orders made under the Nuisances Removal Act, 1855 (*m*), are made when verbally given (*n*).

Six days after order made.

In some counties the quarter sessions are held by adjournment at different places for the convenience of different districts. In this case they are in law but one sessions for the whole county (*o*). And the time for giving notice of appeal must be calculated with reference to the first day of the sessions (*p*); but when for practical convenience the county is divided into distinct divisions, and in each division a distinct court is held, so that all questions locally arising within each division, by practice belong to that division, and all the process for that division is returnable at the court for that division, and the panels of the jurors are made out for that division, and the rules of practice made by the court for each division for the conduct of business in it, assume the day when the court for that division begins its sittings is the first day of the sessions of that division, the time in giving notice of appeal, and sending grounds of appeal against an order of removal, is to be regulated with reference to the rules of practice for that division (*q*).

Where county is divided into distinct divisions.

The notice of appeal should be directed to the parties pointed out by the particular statute as the persons to be made respondents, or, in the absence of any such express direction, to such persons as the circumstances of the case

How directed.

(*h*) *R. v. Justices of Huntingdonshire* (1825), 5 D. & R. 588.

(*i*) *Re Blues* (1855), 24 L. J. M. C. 138.

(*k*) *R. v. Justices of Derbyshire* (1845), 14 L. J. M. C. 84.

(*l*) *Ex parte Johnson* (1863), 32 L. J. M. C. 193; see *ante*, p. 434.

(*m*) 18 & 19 Vict. c. 121, s. 40.

(*n*) *Ex parte Simpkin* (1859), 29 L. J. M. C. 23.

(*o*) *R. v. Justices of Sussex* (1797), 7 T. R. 107; *R. v. Justices of Surrey* (1813), 1 M. & S. 479; *R. v. Justices of Suffolk* (1847), 4 D. & L. 628; *R. v. Justices of Lancashire* (1857), 27 L. J. M. C. 161.

(*p*) *R. v. Justices of Lancashire*, *sup.*

(*q*) *R. v. Justices of Sussex* (1865), 34 L. J. M. C. 69.

indicate as the proper persons to be made respondents (*r*) by their names and additions. If directed to magistrates, their names and office of justices for the county, borough, &c. should be stated. If by or to parish officers, describing them as churchwardens and overseers will, it appears, suffice without naming them. Upon a joint grievance the parties may give a joint notice of appeal (*s*); and where three defendants were convicted on a joint hearing and gave a joint notice of appeal, it was held sufficient, though three separate convictions were returned to the sessions (*t*).

By whom to be given.

By trustees of a turnpike trust.

A notice of appeal on behalf of trustees of a turnpike trust may be given under the words "party aggrieved" by one trustee in the name of, and on behalf of, the rest, though he be not himself personally aggrieved, under a local Act which gave the trustees power to sue and be sued in the name of one of them (*u*).

May be given by attorney.

The general rule, *qui facit per alium facit per se*, applies to the giving of notice of appeal, unless the statute expresses or implies that it is to be a personal act; and therefore ordinarily a man may give a notice by means of his agent or attorney (*x*).

How to be signed.

And by 12 & 13 Vict. c. 45, in the cases to which it applies, "the notice of appeal shall be in writing, signed by the person or persons giving the same, or by his, her or their attorney on his, her, or their behalf;" and under this section a notice was held good which was signed in the name of the appellant, but in the handwriting of the clerk to the appellant's attorney, who wrote the name by the authority of the appellant (*y*). And a notice signed by the clerk to a board of guardians by "A. B., clerk to the aforesaid guardians," was held good, the clerk being an attorney in fact (*z*).

If an appeal is given to the holder of a particular office, the notice must state the appellant to be such holder. If the condition of bringing the appeal is, that the appellant is aggrieved, that must appear on the face of the notice, either expressly or as necessarily resulting and self-evident from so much of the order, conviction, &c. appealed against as is set out in the notice (*a*).

(*r*) See *ante*, "Parties to appeal"—"Respondents," *ante*, p. 424.

(*s*) See *R. v. White* (1792), 4 T. R. 771; *R. v. Justices of Sussex* (1812), 15 East, 206. In each of these cases several ratepayers joined in one appeal against the same rate, though their grievances were several.

(*t*) *R. v. Justices of Oxfordshire* (1843), 12 L. J. M. C. 40.

(*u*) *R. v. Justices of Surrey* (1833), 5 A. & E. 701, n.

(*x*) *R. v. Justices of Middlesex* (1850), 20 L. J. M. C. 42; *R. v. Carew* (1850), *id.* 44; *R. v. Justices of Huntingdonshire* (1850), 19 L. J. M. C. 127.

(*y*) *R. v. Justices of Kent* (1873), L. R. 8 Q. B. 305.

(*z*) *R. v. Guardians of Newport Union* (1864), 33 L. J. M. C. 155.

(*a*) As where the order recited in the notice was for stopping up a highway from the appellant place: *R. v. Justices of Yorkshire (West*

The sessions are the judges of the reasonableness of the notice given, and are to construe its meaning, and the court will not interfere with the exercise of their discretion on such a matter, so long as the construction put upon it by the sessions is one which the document can reasonably bear (*b*); but if the court can see that they have decided against the validity of the notice, by reason of what they deemed a fatal objection in point of law, the court will interfere if they have wrongly decided (*c*), as, for instance, on the ground that a mistake in the notice not calculated to mislead was fatal, or on the ground that a misdescription of the order appealed against invalidated the notice where there was no variance, or it was not material or not calculated to mislead (*d*).

The object of the notice of appeal being to make the other side aware of the intention to appeal against a particular order, conviction, rate or the like, if in describing it reasonable information is given by which they cannot be misled, the court will not construe such notice with the accuracy of a pleading. Thus, where a notice of appeal described an order accurately, except that it was stated to have been made by R. H. C. instead of B. C., there being two justices of the county whose Christian names had those initials respectively, and the sessions refused to hear the appeal on the ground of the variance, Williams, J., granted a mandamus, saying, "the object of the notice of appeal is to give the opposite party notice that the appellants have been aggrieved by an order of removal, perfectly agreeing in description and other respects with the one actually made. But the sessions have got into *apices juris* and nice questions of variance, instead of doing what would be more consonant with the justice of the case" (*e*). So, where an order of removal was directed to the parish officers of a parish which had no such officers, but was composed of three hamlets, each maintaining its own poor, and was served by the removing parish on the officers of one of the hamlets, who appealed to the sessions, and in their notice of appeal described the order as made on the officers of the hamlet, it was held that the removing officers were not allowed to take advantage of the misdescription as they were not misled (*f*).

Defects of notice—misdescription of matter appealed against.

Riding) (1828), 7 B. & C. 678. See also *R. v. Blackawton* (1830), 10 B. & C. 792; *R. v. Justices of Yorkshire (West Riding)* (1833), 4 B. & Ad. 685; *R. v. Justices of Essex* (1826), 5 B. & C. 431; *R. v. Justices of Somersetshire* (1828), 7 B. & C. 681, n.

(*b*) *R. v. Justices of Cambridgeshire* (1850), 1 L. M. & P. 47; *R. v. Justices of Kesteven* (1841), 13 L. J. M. C. 78; and see now 12 & 13 Vict. c. 45, s. 9, *post*, p. 447.

(*c*) *R. v. Justices of Bucks* (1854), 4 E. & B. 259, n.

(*d*) *R. v. Justices of Oxfordshire* (1843), 12 L. J. M. C. 40.

(*e*) *R. v. Justices of Denbighshire* (1841), 9 Dowl. P. C. 509. See *R. v. Justices of Oxfordshire*, *sup*.

(*f*) *R. v. Justices of Carmarthenshire* (1833), 4 B. & Ad. 563.

Where a notice of appeal describing the order appealed against by its date and contents, and as an order of two of his Majesty's justices of the peace, &c. omitted to give the names of the justices, an objection taken to it on that ground was held to be without foundation (*g*).

So where, from a difficulty in deciphering the names of one of the justices who made an order of removal, the notice of appeal wrongly described the order, and the sessions were of opinion that the appellants intended to appeal against the order really made, and misdescribed the order in consequence of such difficulty, it was held that the sessions had jurisdiction to hear the appeal against the real order (*h*).

Mistake as to
name or place
of quarter
sessions.

A mistake in the notice—as, for instance, either the name of the place of the quarter sessions to which the appeal was intended to be, *e.g.*, if a borough within the county is named instead of the county, or *vice versa*—may or may not be fatal, according to whether it could be treated as erroneous surplusage not calculated to mislead or not. Thus, if the appellants discover the mistake and correct it a reasonable time before the proper sessions, it could not have misled them, and the notice would be sufficient (*i*); but if both parties, or the appellants only, have acted upon the mistaken notice, and gone to the sessions named therein, and then only learned their error, it cannot be treated as surplusage, and the notice is invalid (*k*). Respondents are entitled to treat a notice of appeal for a sessions being without jurisdiction as made under a mistake, and as a notice for the sessions having jurisdiction, and to prepare for trial at the proper sessions. Thus, where borough sessions were the only competent sessions to entertain an appeal, and notice of appeal was given not to the borough sessions but to the county sessions, the respondents were held justified in appearing at the borough sessions and obtaining an order dismissing the appeal with costs, and such order was held good (*l*).

Abandonment
of notice of
appeal.

A notice of appeal may be abandoned, and a fresh one given, provided it is in proper time (*m*).

Where the grounds of the appeal must, by statute, be stated in the notice, none beside those fairly included in its terms can be entered into at the sessions. And for the decisions with respect to such points arising on the notice, see *post*, p. 446, as to grounds of appeal.

This subject is further treated of when the particular

(*g*) *R. v. West Houghton* (1843), 5 Q. B. 300.

(*h*) *R. v. Justices of Middlesex* (1846), 15 L. J. M. C. 101.

(*i*) *R. v. Justices of Bucks* (1854), 4 E. & B. 259, n.; *R. v. Recorder of Liverpool* (1850), 15 Q. B. 1070.

(*k*) *R. v. Justices of Salop* (1854), 4 E. & B. 257.

(*l*) *R. v. Recorder of Leeds* (1861), 3 E. & E. 561.

(*m*) *R. v. Justices of Middlesex* (1840), 9 Dowl. P. C. 163.

appeals against poor rates, orders of removal, &c., are considered.

The notice of appeal should in general be left at the place of abode of each respondent, unless personal service is made necessary by statute. Service of notice of appeal.

On appeal against a poor rate, on the ground that another person is underrated or overrated, the appellant must give notice to the person interested under the 41 Geo. 3, c. 23, s. 4, and when the appellant gave a notice of appeal containing several grounds of appeal, amongst which was one as above, but he had given no such notice to the persons interested, the sessions were held to be entitled to treat the parties named as if they were respondents in the appeal, and to refuse to hear the appeal on the ground that no notice had been given to them, or to go into other grounds of appeal which did not require such notice to be given, notwithstanding the appellants offered to abandon the grounds of appeal which required notice (*n*); but under 17 Geo. 2, c. 38, s. 4, the sessions in such case must not dismiss the appeal, but adjourn it till the following sessions (*o*). Where notice of appeal was required to be given "to the person who is intended to be or who may be affected by such appeal" under the Mersey Dock Consolidation Act, 1858 (*p*), against a conviction for negligently damaging a vessel, upon the complaint of the owners of the vessel: it was held, that service of notice of appeal upon one of the registered owners of the vessel was service upon all, and entitled the appellant to be heard (*q*). Service on persons underrated.

Under some statutes notice of appeal may be served by being sent through the post—*e.g.*, on an appeal against an order of removal (*r*). Service of notice by post.

The service of such notice when made by post is deemed to be made when according to the regular and usual course of post it would reach the hands of the parish officers (*s*).

Service of notice of appeal would probably be deemed "process" within the operation of "The Lord's Day Act" (*t*), and be void to all intents and purposes if made on Sunday (*u*); but transmission by the post is not such service as would be deemed process within the Lord's Day Act (*x*).

(*n*) *R. v. Justices of Cambridgeshire* (1850), 1 L. M. & P. 47.

(*o*) *R. v. Eyre* (1856), 6 E. & B. 992.

(*p*) 21 & 22 Vict. c. xcii. s. 335.

(*q*) *R. v. The Recorder of Liverpool* (1861), 31 L. J. M. C. 127.

(*r*) 14 & 15 Vict. c. 105, s. 10.

(*s*) *R. v. Slawstone* (1852), 21 L. J. M. C. 145.

(*t*) 29 Car. 2, c. 7, s. 6.

(*u*) *R. v. Justices of Middlesex* (1848), 17 L. J. M. C. 111; *R. v. Justices of Huntingdonshire* (1783), Cald. 283; *R. v. Justices of Lancashire* (1852), 16 Jur. 1067, n.

(*x*) *R. v. Justices of Leominster* (1862), 31 L. J. M. C. 95.

Service by
and upon
attorney
for party.

Though a service by an attorney for the party may be good service, it does not follow that service upon the attorney of the respondent would have the same effect unless the statute expressly so enacts (*y*).

Service of notice of appeal under a statute which required notice in writing to be given to the justices of the peace, from whose judgment such appeal should be made, was rightly served on the clerk to the justices in court at the time, the convicting justices and the clerk then being in court (*z*); but where a service of notice of appeal against a conviction under the Excise Acts was required to be given to the adverse party or left at his place of abode, a service of such notice, by leaving it with a clerk at the excise office in the place where the conviction was, is not a good service, the statute in such case requiring service on the excise officer who laid the information (*a*).

If more than one magistrate acts in making an order, &c., they proceed on joint authority, and it seems sufficient to serve a joint notice of appeal on one of them (*b*). So a notice of appeal served on one overseer is good (*c*).

An admission of due service of notice of appeal is evidence for the justices that the notice was served in due time; but the respondent is not precluded from disputing the fact of due notice, and the justices may find the fact or not as the evidence leads them (*d*).

As to grounds
of appeal.

Baines' Act (*e*) recites that a statement of the grounds of appeal, when required by this or any other statute, is for the purpose of enabling the party receiving it to inquire into the subject of such statement, and, if need be, to prepare for trial; and enacts, "that upon the hearing of any appeal to any court of general or quarter sessions of the peace, no objection on account of any defect in the form of setting forth any ground of appeal shall be allowed, and no objection to the reception of legal evidence offered in support of any ground of appeal shall prevail, unless the court shall be of opinion that such ground of appeal is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement, and to prepare for trial: provided always, that in all cases where the court shall be of opinion that any objection to any ground of appeal, or to the reception of evidence in

Defects in
form of
grounds.

(*y*) *R. v. Kimbolton (Inh.)* (1837), 6 A. & E. 603; *R. v. Justices of Middlesex* (1850), 20 L. J. M. C. 42.

(*z*) *R. v. Eaves* (1870), 39 L. J. M. C. 70.

(*a*) *Ibid.*

(*b*) See *per Coleridge, J.*, in *R. v. Justices of Staffordshire* (1836), 4 A. & E. 842.

(*c*) *R. v. Recorder of Liverpool* (1861), 31 L. J. M. C. 127, *per Crompton, J.*

(*d*) *R. v. Justices of Gloucester* (1847), 16 L. J. M. C. 57.

(*e*) 12 & 13 Vict. c. 45, s. 3.

support thereof, ought to prevail, it shall be lawful for such court, if it shall think fit, to cause any such ground of appeal to be forthwith amended by some officer of the court, or otherwise on such terms as to payment of costs to the other party, or postponing the trial to another day in the same sessions, or to the next subsequent sessions, or both payment of costs and postponement as to such court shall appear just and reasonable."

Where a ground or grounds of appeal are frivolous, see the provision as to costs, *post*, p. 477.

The decisions of the court of general or quarter sessions of the peace upon the hearing of any appeal as to the sufficiency of the statement of any ground or grounds of appeal, and as to the amending or refusing to amend any order or judgment of a justice or justices appealed against, or the statement of any ground or grounds of appeal, and as to the substitution of any new recognizance or recognizances shall be final, and shall not be liable to be reviewed in any court by means of a writ of *certiorari*, or *mandamus*, or otherwise (*f*).

Decisions of sessions final as to sufficiency of statement of grounds of appeal.

Where grounds of appeal are not required to be given under Baines' Act (*g*), or the statute under which the appeal lies, but the appellant has served them on the respondent, and at the hearing they disclose no valid ground of appeal, and the appellant tenders evidence in support of a good ground different from those stated, the proper course for the court to take is, to consider whether the respondents have been misled, and if they have been, not to dismiss the appeal but to adjourn the hearing till the next sessions, or a subsequent day of the same sessions, as the justice of the case demands (*h*).

Where grounds of appeal unnecessary, how served.

Upon appeal against a conviction, under 5 Geo. 4, c. 83, s. 4, of a party as a rogue and vagabond for obscenely exposing his person in a place of public resort with intent to insult a female, the ground of appeal was stated to be, that the appellant was not guilty of the said offence, and was held sufficient, the appeal being against a conviction on the merits, and not on a matter of form (*i*); but where a statute requires the particular causes or grounds of appeal to be stated, and on an appeal against overseers' accounts, the notice merely specified a certain number of items to which objection was made, but did not give the particulars of objection, the notice was held to be bad on the ground that there might be several possible objections, and it did not specify which particular objection was to be brought forward (*k*). So a notice of appeal against a bastardy order was held bad for want of

Sufficiency of statement of grounds of appeal.

(*f*) 12 & 13 Vict. c. 45, s. 9.

(*g*) See *ante*, p. 439.

(*h*) *R. v. Westmoreland* (1829), 10 B. & C. 226.

(*i*) *R. v. Justices of Newcastle-on-Tyne* (1831), 1 B. & Ad. 933.

(*k*) *R. v. Sheard* (1824), 2 B. & C. 856.

stating the grounds of the appeal under 49 Geo. 3, c. 68, s. 5, for in the absence of such statement the respondents would not know whether the appellant's contention was that he was not the father of the child or that it was not born within the complaining parish (*l*). So, an appeal against a rate, for a defect appearing on the face of it, cannot be heard, unless the notice specify the defect (*m*).

Where a ground of appeal objected that the grounds of removal were bad for want of sufficient certainty in setting out a derivative settlement, and in alleging a marriage of the parents of the pauper, by stating only the fact of the marriage and the time of its celebration, but not stating the place, the objection was held to be untenable (*n*).

Changing
grounds of
appeal.

In cases of removal of paupers, by virtue of the words of 4 & 5 Will. 4, c. 76, s. 81, where the hearing of the appeal is adjourned to adjourned sessions, the grounds of appeal may be changed at any time before the fourteen days before such adjourned sessions, such adjourned sessions being, in the words of the Act, the sessions at which the appeal was "intended to be tried," so that the character and identity of the appeal be not changed thereby (*o*); but where, on the hearing of an appeal against an order of removal, the bench, being equally divided, adjourned the case to the next sessions; the court held, that the appellants could not, after such adjournment, serve a fresh statement of their grounds of appeal, for the reason that the appeal was "intended to be tried" at the former sessions (*p*). So, after a refusal by sessions to respite an appeal against a poor rate on the ground, amongst other, that certain persons were improperly rated, in order that such persons might be served with notice of such grounds, and a mandamus issued to compel the sessions to respite and hear the appeal; and the appellant then gave a second notice, omitting the above ground; it was held, that he had thereby changed the nature of the appeal, and the sessions were not bound to hear the appeal upon such last-mentioned notice and ground, because the appeal in its altered form was not "the said appeal" which the mandamus had issued to compel the sessions to hear (*q*). And where an appeal was given to the borough sessions, with the further appeal if the party were dissatisfied to the county quarter sessions, the party is confined to the same grounds which were taken at the borough sessions, and cannot be allowed to add fresh grounds (*r*).

(*l*) *R. v. Justices of Oxfordshire* (1823), 1 B. & C. 279.

(*m*) *R. v. Bromyard (Ink.)* (1828), 8 B. & C. 240.

(*n*) *R. v. Marton-eum-Grafton* (1847), 10 Q. B. 971.

(*o*) *R. v. Kendal (Ink.)* (1859), 28 L. J. M. C. 110; *R. v. Justices of Derbyshire*, in note to *R. v. Kimbolton* (1837), 6 A. & E. 612.

(*p*) *R. v. Arlecdon* (1839), 11 A. & E. 87.

(*q*) *R. v. Eyre* (1857), 7 E. & B. 619.

(*r*) *R. v. Justices of Suffolk* (1818), 1 B. & A. 640 (poor rate, local Act).

12 & 13 Vict. c. 45, s. 1, provides that it shall not be lawful for the appellant, on the trial of any appeal within that Act, to go into or give evidence of any other grounds of appeal besides those set forth in the notice of appeal; and it has been decided that, where a statute prevents a party from going into or giving evidence on the hearing of the appeal of any other grounds of appeal than those set forth in his notice, it extends to objections apparent upon the face of the order so appealed against (s).

It is often required, as a preliminary step to the appeal, that a recognizance should be entered into by the appellant with sureties conditioned to try the appeal and pay the costs, and when this is so, it is a condition precedent to the right of the sessions to hear the appeal (t). Of entering into recognizances as a preliminary step to the appeal.

Appeals in bastardy cases, *post*, p. 521, and under the licensing Acts are instances.

The terms in which this recognizance has to be given must depend upon the statute requiring it.

It is sufficient if the recognizance be verbally acknowledged within the time fixed by the statute for entering into it, and it may be perfected afterwards by entry on the roll (u).

When the recognizance is required to be entered into "forthwith," it means within a reasonable time under all the circumstances (x); and when the recognizance was required to be entered into "immediately," it was held to mean within a reasonable time; and where the conviction took place on a Saturday and the recognizances were entered into on the following Thursday, the statute was held to be complied with (y). Where the appellant had to enter into a recognizance within two days of giving notice of appeal, Sunday must be included in calculating the time, so that where notice was given on Friday, the recognizance had to be entered into on Saturday, and Monday was too late (z). Where a statute requires a notice of appeal to be given within a certain time and a recognizance to be entered into within a certain time, the justice before whom the recognizance is tendered has nothing to do with the validity of the notice of appeal, but must take the recognizance irrespective of the validity or invalidity of the notice, for the validity or invalidity of the notice is a matter for the sessions to decide (a).

(s) *R. v. Withernwick (Inh.)* (1837), 6 A. & E. 273; *R. v. Bromyard (Inh.)* (1828), 8 B. & C. 240.

(t) *R. v. Justices of Lincolnshire* (1824), 3 B. & C. 548.

(u) *R. v. Justices of St. Albans* (1838), 8 A. & E. 932; *Hall v. Winkfeild* (1616), Hob. 195.

(x) *R. v. Justices of Worcester* (1839), 7 Dowl. 789.

(y) *Re Blues* (1855), 24 L. J. M. C. 138.

(z) *Ex parte Sumpkin* (1859), 29 L. J. M. C. 23.

(a) *Re Carter* (1855), 24 L. J. M. C. 72.

A recognizance required to be entered into by a parish may be entered into by an inhabitant on behalf of himself and other inhabitants prosecuting the appeal (*b*).

There seems to be some doubt whether a corporation can, strictly speaking, enter into a recognizance, though this difficulty is, in practice, evaded by one or more members of the body entering into one for it (*c*).

Substitution
of new recog-
nizances for
insufficient
ones.

Where a recognizance or recognizances are required as a condition of any appeal against any order or conviction, in order to obviate the liability of appellants to be prevented from trying their appeals upon the merits in consequence of imperfections in the taking of such recognizances, it is enacted by 12 & 13 Vict. c. 45, s. 8, "that where any recognizance or recognizances which shall have been entered into within the time by law required before any justice or justices, for the purpose of complying with any such condition of appeal, shall appear to the court before whom such appeal is brought to have been insufficiently entered into, or to be otherwise defective or invalid, it shall be lawful for such court, if it shall so think fit, to permit the substitution of a new and sufficient recognizance, or new and sufficient recognizances, to be entered into before such court in the place of such insufficient, defective, or invalid recognizance or recognizances, and for that purpose to allow such time and make such examination, and impose such terms as to payment of costs to the respondent or respondents, as to such court shall appear just and reasonable; and such substituted recognizance or recognizances shall be as valid and effectual, to all intents and purposes, as if the same had been duly entered into at an earlier time or times as required by any statute or statutes for that purpose."

And the decisions of any court of general quarter sessions of the peace, upon the hearing of any appeal as to the substitution of any new recognizance or recognizances as aforesaid, shall be final, and shall not be liable to be reviewed by means of a writ of *certiorari*, or *mandamus*, or otherwise (*d*).

Where the
appellant is
a company.

It has been the practice for a great number of years now past to accept recognizances entered into on behalf of incorporated companies by one of their directors authorized by a resolution of the company, and with that practice the court saw no reason to interfere (*e*). But a recognizance entered into by the managing director of a company in liquidation, without authority either from the company before liquidation, or from the liquidator, is insufficient (*e*).

As to notice of
recognizance.

An additional preliminary to the appeal sometimes required is, that notice of the recognizance having been entered into

(*b*) *R. v. Abergele* (1836), 5 A. & E. 795.

(*c*) *Cortis v. Kent Waterworks Co.* (1827), 7 B. & C. 330; *R. v. Mayor, &c. of Manchester* (1857), 7 E. & B. 453.

(*d*) 12 & 13 Vict. c. 45, s. 9.

(*e*) *Southern Counties Deposit Bank (Limited) v. Boaler* (1895), 59 J. P. 536.

should be given to the other party, and this, when imposed, is a condition precedent.

If the party upon whom notice of recognizance is served undertakes to admit due service of the notice, such admission is evidence against him that the service was made in due time; and if the sessions act upon such evidence and thereupon overrule an objection to the time of service, the court will not interfere (*f*).

SECTION 4.

OF THE ENTRY, ADJOURNMENT, HEARING, AND DETERMINATION OF APPEALS AT THE QUARTER SESSIONS.

The names of the parties to each appeal should be furnished by the appellants to the clerk of the peace, who should enter on a separate paper the names of each appeal in the order in which he receives them (*g*).

The sessions will not be compelled to hear an appeal where there is a reasonable rule and a settled practice with reference to the time for the entry of appeals, and which they have refused to hear on the ground that it was not entered in due time. Thus the sessions may make a rule of practice that all appeals shall be entered on the first day of sessions, and may refuse to enter after that time (*h*), or before twelve o'clock on the first day of sessions (*i*); but if the rule is unreasonable, or the practice indistinct and unsettled, a mandamus will issue to them to hear (*j*). Thus, where the sessions, by a rule of their own practice, required an appeal to be entered and the grounds of appeal deposited with the clerk of the peace three clear days before the first day of sessions, and refused to hear an appeal because such rule had not been observed, the Court of Queen's Bench held that they had no power to make such a rule (*k*).

Rules of sessions as to entry.

(*f*) *R. v. Justices of Gloucestershire* (1847), 16 L. J. M. C. 57.

(*g*) A mistake of a clerk of the peace in stating three appeals as one, which from particular circumstances was overlooked at the sessions, but became afterwards material, did not prevent the issue of a mandamus to enter continuances and hear the appeals: *R. v. Justices of Yorkshire (West Riding)* (1833), 4 B. & Ad. 685; where an appeal had been entered by the clerk of the peace in a wrong name, by which the appellants were made to appear to be the guardians of a union instead of the churchwardens and overseers of a parish, and the sessions refused to alter the entry, it could not be treated as an appeal of the parish officers, and when the sessions refused to hear the appeal at the instance of the parish officers the Court of King's Bench declined to compel them to do so: *R. v. Justices of Leicester* (1847), 3 New Sess. Cas. 1.

(*h*) *R. v. Justices of Warwickshire* (1845), 6 Q. B. 750.

(*i*) *R. v. Justices of Derbyshire* (1852), 22 L. J. M. C. 31.

(*j*) *Ibid.*

(*k*) *R. v. Pawlett* (1873), L. R. 8 Q. B. 491; *R. v. Bird and others*, [1898] 2 Q. B. 340.

The justices at adjourned quarter sessions were held right in refusing to receive an appeal, the entry of which had been refused at the original session, for want of the notice of appeal and recognizance required by an Act which gave an appeal to the "next general quarter sessions"; but directed that no such appeal should be "brought, received, or heard," unless such notice or recognizance should be given, &c. (*l*).

As to respited appeals.

But it has been held that when a particular sessions is fixed to which the appeal is to be brought, and notice of appeal is required, and it is provided that the appeal shall not be "heard" unless such notice has been given, the appeal where such notice has not been given before the specified session may and should nevertheless be entered and respited at the specified session, and the notice given before the following session, and this was so held on the Poor Law Amendment Act in *R. v. Kimbolton* (*m*); but upon the Highway Act (*n*), which allows an appeal "upon giving" ten days' notice together with the statement of grounds of appeal, and afterwards provides that the appellant shall not be "heard" in support of his appeal unless such notice and statement has been so given: it was held, that the court could not enter and respite the appeal where such notice had not been given (*o*); and the same point was mooted again in the Poor Rate Act, and the Union Assessment Committee Amendment Act, 1864 (*p*), s. 1, in *The Liverpool United Gas Co. v. Overseers of Everton* (*q*), but no decision was given on it.

A case must not be stated on a preliminary objection unless the appeal is, in other respects, disposed of.

The King's Bench Division will not take notice of a case stated on a motion to enter and respite an appeal intended to raise a question whether preliminaries to the appeal were in order, the court saying that a point not finally disposing of the appeal ought not in any form to be brought before the court on a case (*r*); but the opinion of the court might have been obtained in that case by a different procedure, as by a rule for a prohibition to the recorder (*s*); or a rule for a *certiorari* to quash the order of entry and respite upon affidavits raising the question of jurisdiction, as in *R. v. Lancashire JJ.* (*t*), which would seem to be the most proper course.

Appeal irregularly entered and

If an appeal is irregularly entered and then respited, it may be dismissed on that ground on its coming on for hearing (*u*);

(*l*) *R. v. Justices of Lincolnshire* (1824), 3 B. & C. 548.

(*m*) (1837), 6 A. & E. 603.

(*n*) 5 & 6 Will. 4, c. 50.

(*o*) *R. v. Justices of Lancashire* (1857), 27 L. J. M. C. 161.

(*p*) 27 & 28 Viet. c. 39.

(*q*) (1871), L. R. 6 C. P. 414.

(*r*) *R. v. London and North Western Rail. Co.* (1874), 43 L. J. M. C. 57.

(*s*) *Liverpool United Gaslight Co. v. Overseers of Everton*, *sup.*

(*t*) *Sup.*

(*u*) *R. v. Oundle (Inh.)* (1842), 3 Q. B. 353, n.; *R. v. Justices of Oxfordshire* (1813), 1 M. & S. 446.

and the Court of Queen's Bench has gone so far as to interfere by mandamus to compel the sessions to erase an entry on their records of appeals which had been procured by fraud (*x*). In that case, on notice of an order removing a pauper from A. to B., the overseers of B. gave notice of appeal, which they afterwards countermanded, reserving the right to appeal when the pauper should be actually removed, whereupon at the following sessions the overseers of A., according to the practice of the court, entered an appeal against the order, as by the overseers of B., but without their knowledge, and the order was confirmed with costs. More than six months after the confirmation the pauper was removed to B., whereupon the overseers of B. applied at the next sessions to erase the entry of the previous appeal and order, and to enter their appeal against the removal; the sessions refused, and the court issued a mandamus to erase the prior entry, and to enter and hear the subsequent appeal. And it was said in this case that even in a case of fraud the quarter sessions had no power to erase an entry in their records of appeals at a previous court without the authority of the Court of Queen's Bench (*y*).

respited may
be dismissed.

The appeals are usually called on for hearing in the order in which they stand in the paper of the clerk of the peace. This is, however, subject to any other arrangement which may be made by the court (*z*), who may exercise their discretion in taking them in any order which public convenience or particular circumstances, as in the case of many persons attending from a great distance, or of the necessary attendance of jurors, in appeals under some statutes, may appear to them to make convenient for the more effectual attainment of justice.

Order of
calling on
appeals.

The first proper step, after calling on the appeal, is for the clerk of the peace to read the order or conviction, &c. appealed against, and which should always be returned to the sessions (*b*). The notice of appeal, as well as of the entry into recognizance, if required by statute as conditions precedent to the right of appeal, must then be proved; whether it is intended to try, or only to move to respite the hearing; for till it is made to appear to the court that the appeal is duly lodged at the proper sessions, as well as that due notice has been given, and recognizance entered into, where so required by the Act applicable to the appeal, their jurisdiction to hear or adjourn it will not attach. The neglect of any one of the

Proceeding
after appeal
called on.

(*x*) *R. v. Justiers of West Riding* (1843), 5 Q. B. 1.

(*y*) *Per* Lord Denman, C. J., and Patteson, J., *Ibid.*

(*z*) *R. v. Stamper* (1841), 1 Q. B. 119, 127.

(*b*) When so returned, it is the only one of which the sessions will take notice, and a mere formal mistake in a copy of it given to the appellant will not afford ground for quashing the original so returned: *R. v. Allen* (1812), 15 East, 336, 346; see *In re Rix* (1821), 4 D. & R. 352; *R. v. Barker* (1800), 1 East, 186.

above, or of other matters so required by any statute, will have the effect of preventing the sessions from entering or receiving, or dealing with the appeal in any manner; for, till it is regularly brought before them by compliance with the provisions of the Act, it cannot be entertained, even for the purpose of adjourning it only, as the sessions cannot thus acquire a jurisdiction by an act of their own (*c*); and all they can do is to dismiss it. But if the performance of the condition, such as the giving notice to the respondent, is made impossible by the act of God, in that the respondent has died before the time for giving notice has expired, the appellant is excused, and the appeal must be heard notwithstanding the non-performance of such condition precedent (*d*). But in cases in which no specific notice of appeal or recognizance is prescribed by statute, and in such cases as well as those in which one or both are required, but either no particular time is fixed for giving them, or "reasonable" notice is required, the sessions must decide whether reasonable notice of appeal has been given; while even in cases where no notice need be given by statute, and no condition such as the entering into recognizances to take the place of notice has been imposed, there is an implied condition that notice should be given to the other party, and they must decide whether the respondent has been so far surprised by the want of it, or misled by any notice which has in fact been given, as to be unable to meet the case without further time (*e*). If they find that he has, or that reasonable notice has not been given, they may respite the hearing at the instance of the respondent (*f*) on payment of costs, or without it, as they think reasonable; and if they do so, may respite it without any notice of appeal which may have been actually given, being proved or expressly admitted (*g*); and if the sessions decide upon following a rule of practice of theirs as to notice, and wrongly refuse to hear an appeal on the ground that it was not complied with and injustice was done, the court issues a mandamus to enter continuances and hear the appeal (*h*). If the Act which gives the appeal requires notice, and a statement therein of the grounds of appeal, the appellant cannot travel out of the notice; but if the grounds are not so required to be alleged, he may do so, unless the respondent is misled by it, in which case

Condition that notice of appeal should be given, when implied.

(*c*) *R. v. Justices of Oxfordshire* (1813), 1 M. & S. 446; *R. v. King's Langley* (1698), Salk. 605; *R. v. Justices of Lincolnshire* (1824), 3 B. & C. 548; *R. v. Lancashire* (1857), 27 L. J. M. C. 161.

(*d*) *R. v. Justices of Leicestershire* (1850), 19 L. J. M. C. 209.

(*e*) *Re Blues* (1855), 24 L. J. M. C. 138.

(*f*) *R. v. Justices of Herts* (1833), 4 B. & Ad. 561; *Re Blues, ubi sup.* An obligation to respite for want of reasonable notice is imposed by 9 Geo. 1, c. 7, s. 8, in appeals against orders of removal; and by 17 Geo. 2, c. 38, s. 4, in appeals against rates.

(*g*) *Re Blues, ubi sup.*

(*h*) *Ibid.*

it is clear the sessions should adjourn the appeal (*i*). A respondent may so waive proof of notice of appeal, or admit it, as to make proof of it unnecessary (*k*).

The practice of entering and respiting appeals to the next sessions, in cases where that step is not authorized by statute, seems very questionable (*m*). Assuming, however, the appeal to be properly entered so as to give the sessions jurisdiction, that is, if all the preliminary conditions imposed by the statute, as notice of appeal, &c., are proved or admitted (*n*), either party may move to adjourn the hearing. One such adjournment used to be made a matter of course under 9 Geo. 1, c. 7, s. 8, in appeals against orders of removal; and by 17 Geo. 2, c. 38, s. 4, appeals against poor rates and overseers' accounts, duly entered, but without reasonable notice previously given, shall be adjourned to the next quarter sessions, and there finally determined (*o*); and by 41 Geo. 3, c. 23, s. 6, where upon an appeal against a poor's rate, on the ground that other persons are improperly rated, notice is required to be given to the persons whose rating is objected to, if notice has only been given to some of such persons, and not to all, the next sessions are bound, on the application of the respondent, to enter and respite the appeal to the following sessions, and have no discretion intrusted to them (*p*); but in the case of other appeals, it is also in the discretion of the sessions to adjourn the hearing in the exercise of the power inherent in all courts for the advancement of justice, and this power they may exercise in the middle of the case, after evidence has been given, for any cause which, in their discretion, may render the adjournment expedient (*q*). But the power of adjourning, in such circumstances, ought to be cautiously and carefully exercised (*r*). It is a bad practice to adjourn a case for the purpose of enabling a party to

Adjournment
of appeals.

Adjournment
compulsory,
when.

(*i*) *R. v. Justices of Westmoreland* (1829), 10 B. & C. 226.

(*k*) *R. v. Justices of Herts, sup.*

(*m*) *Liverpool United Gas Co. v. Overseers, &c. of Everton* (1871), L. R. 6 C. P. 414.

(*n*) *R. v. Justices of Oxfordshire* (1813), 1 M. & S. 446, 448. See *ante*, p. 454. If a regular notice of appeal has been given for one sessions, and the appeal is adjourned at the instance of the appellants, after hearing counsel on both sides, the next sessions should hear it, or entertain a further application to adjourn it, if still necessary, without requiring proof of any notice of trial for that sessions: *R. v. Justices of Gloucestershire* (1835), 3 Dowl. P. C. 298, *per* Littledale, J.; *R. v. Justices of Norfolk* (1834), 5 B. & Ad. 990.

(*o*) *R. v. Eyre* (1856), 6 E. & B. 992; *R. v. Justices of Bucks* (1803), 3 East, 342; *R. v. Justices of Wilts* (1828), 8 B. & C. 380; *R. v. Justices of Staffordshire* (1806), 7 East, 549.

(*p*) *R. v. Eyre, sup.*

(*q*) *R. v. Cambridge Union* (1861), 30 L. J. M. C. 137.

(*r*) *Ibid.*

strengthen their evidence, as to give time for search to be made for an original document, so as to let in secondary evidence of it; and, in general, an appeal, once begun, ought not to be adjourned, but the power of adjournment may be from one sessions to another sessions, and is not confined to an adjournment from one sitting to another sitting of the same sessions. Even where a statute gives an appeal to a particular sessions directing the justices of the *said* sessions to hear and *determine* it, they have an incidental power to adjourn the hearing after it has been duly entered, when their immediate proceeding with it, *e.g.*, in the case of absence of a material witness, appears to them inconvenient for the advancement of justice(s); but the authority to adjourn the appeal to a subsequent sessions may be limited by statute. Thus, the Alehouse Act, 1828 (*t*), by which an appeal was given to the "next" sessions, or, in a certain event, to the "next subsequent" sessions, and the court at such sessions is to hear and determine and make its order, with or without costs, takes away the power of adjournment to a subsequent sessions (*u*), but it does not prevent the adjournment of the same sessions to a future day (*x*). The power of adjournment to a subsequent sessions was also taken away by 26 Geo. 2, c. 74 (*rep.*), where it was enacted, that the table of fees to be taken by clerks of the peace was to be made at one sessions and approved by the justices at the next succeeding sessions, and it was held to take away the power of adjournment to a sessions after the next subsequent sessions (*y*). But under the modern statutes, even in cases under the Acts relating to the removal of the poor, the best practice is to try the appeal at the first sessions when it can be done, and entering and respiting should not be a matter of course, but in each case the court should exercise its judgment whether the circumstances of the case require that the appeal should be adjourned (*z*); therefore, if an appellant, as he is entitled to do, by taking all the time allowed him for applying for a copy of the depositions taken on the making of an order of removal, and giving his notice of appeal, disables himself from giving notice and serving grounds of appeal in time for the next sessions, he is not entitled to pass over those sessions if they were at the time of the serving of the order practicable, but

(*s*) *R. v. King's Langley* (1698), Salk. 605; *R. v. Wilts* (1811), 13 East, 352; *R. v. Justices of Westmoreland* (1829), 10 B. & C. 226; *R. v. Kimbolton (Inh.)* (1837), 6 A. & E. 603. The entering and adjourning appeals against orders of removal is governed by 9 Geo. 1, c. 7, s. 8: see *R. v. Justices of Kent* (1828), 8 B. & C. 639; and *post*, Chap. V.

(*t*) 9 Geo. 4, c. 61.

(*u*) *R. v. Belton* (1848), 17 L. J. M. C. 70.

(*x*) *Rawnsley v. Hutchinson* (1871), L. R. 6 Q. B. 305.

(*y*) *Bowman v. Blyth* (1856), 26 L. J. M. C. 57.

(*z*) *R. v. Skirecoat* (1859), 28 L. J. M. C. 224.

he ought at least to enter and respite his appeal (*a*). Then, on the application to respite, the court should inquire whether he has made the sessions impracticable by dilatory or negligent conduct, and if they are of opinion that the appellant had time to bring on the trial, and no good ground for delay, they ought not to respite the appeal (*b*); but on appeals against orders of removal, the Poor Law Amendment Act, 1834 (*c*), and 11 & 12 Vict. c. 31, s. 9, do not refer to or define any limit of time which, after service of the order of removal, the parish authorities may require or take for deciding whether they will appeal or submit to the order, or for fixing the maximum of delay, after which the sessions next in fact may be passed over as not the next practicable, or after which the appellant may demand an adjournment, but leave that matter as it was before under 13 & 14 Car. 2, c. 12; and, therefore, now, if the appellants enter their appeal at a sessions which the appellants have made impracticable to try at in consequence of taking the full time allowed them by those statutes for giving notice of trial and sending grounds, those sessions, upon the application to respite the appeal, have a right to consider whether they have been guilty of unreasonable delay, and in their discretion may refuse an adjournment (*d*). So the judgment only upon an appeal may be postponed, for there cannot be a better reason for an adjournment than that the justices have not made up their minds as to the judgment to be given (*e*).

The sessions are to judge of the sufficiency of the ground assigned for adjournment (*f*). Where notice of appeal was given, and both parties attended at sessions, but late in the first day the appellants moved to enter and adjourn the appeal to the next sessions on an affidavit stating the absence of a material witness, the sessions refused the application, except on the terms of paying the respondents their actual costs of the day, as was their practice where due notice had been given and not countermanded in time. These costs not being paid the appeal was not entered. The Court of King's Bench held that the respite of the hearing was to be granted or not, as the sessions might think reasonable, and that their discretion had not been improperly exercised (*g*). Nor will the court compel by mandamus the hearing an appeal, where

Adjournment
upon terms.

(*a*) *R. v. Justices of West Riding* (1858), 27 L. J. M. C. 269; *R. v. Peterborough* (1857), 26 L. J. M. C. 153.

(*b*) *R. v. Skircoat* (1859), 28 L. J. M. C. 224.

(*c*) 4 & 5 Will. 4, c. 76, ss. 79, 81.

(*d*) *R. v. Justices of Sussex* (1865), 34 L. J. M. C. 69, overruling *R. v. Justices of Suffolk* (1835), 4 A. & E. 319, and *R. v. Justices of Herefordshire* (1840), 8 Dowl. P. C. 638.

(*e*) *Keen v. The Queen* (1847), 16 L. J. M. C. 180.

(*f*) *R. v. Justices of Wills* (1811), 13 East, 352; *R. v. Justices of Staffordshire* (1842), 2 Dowl. N. S. 353.

(*g*) *R. v. Justices of Monmouthshire* (1831), 1 B. & Ad. 895.

Adjournment
to, when.

the sessions, after arguments for and against an adjournment of the hearing, on account of the absence of a material witness, decided against the postponement (*h*). Adjournment of an appeal, at the instance of the appellant, dispenses with a strictly regular notice of trial for the next sessions (*i*). It should not be adjourned later than to the next original sessions, or to an adjourned session held in the interval (*k*); but if convenience requires it, and the statute does not prohibit it, they have the power to adjourn to any future sessions (*l*).

Notice of trial
after respite.

Though an appeal has been entered and respited, it cannot be heard if the conditions annexed to the appeal have not been complied with, *e.g.*, the giving of notice of appeal in due time or form, because it never was duly entered (*m*).

Whether after an appeal against an order of removal had been entered and respited at one session, and a copy of the order of respite was duly served on the respondents, the general rules of law made it also requisite to give them notice of trying it at the session to which the respite was granted, was debated in *R. v. Lambeth* (*n*); and held in the negative, the service of the order of respite being considered a substantial notice of trying the appeal at the next session, without more. So, if a statute gives a party a right of appeal on entering into a recognizance without requiring a notice of appeal, he may enter his appeal and get it respited at the next sessions, having previously entered into such recognizance, without notice to the other side (*o*).

But if the practice of the particular session requires the giving to respondents a particular notice of trying a respited appeal, it must be complied with, or the session may dismiss it altogether (*p*); for after it was once entered, the appellant was bound to conform to the practice, though the notice not being required by the statute giving the appeal would have been unnecessary if he had tried his appeal at the first sessions instead of having it respited (*q*). A local Act required ten days' notice of appeal without providing anything as to notice of trying respited appeals; a notice of appeal was duly served

(*h*) *Ex parte Becke* (1832), 3 B. & Ad. 704. Case of appeal against order of filiation under the old law.

(*i*) *R. v. Justices of Gloucestershire* (1835), 3 Dowl. P. C. 298.

(*k*) See *ante*, p. 34: *R. v. Grince* (1717), 19 Vin. 358.

(*l*) *R. v. Justices of Westmoreland* (1868), L. R. 3 Q. B. 457.

(*m*) *R. v. Justices of Oxfordshire* (1813), 1 M. & S. 446, *ante*, p. 452.

(*n*) (1823), 3 D. & R. 340; see 3 D. P. C. 298; for it could not have been served by the appellants for any other purpose, or understood by respondents in any other light.

(*o*) 1 Burn's J., tit. "Appeal," p. 256, 30th ed.

(*p*) Anon. (1719) Stra. 315; see *R. v. Lambeth*, *sup.*; *R. v. Justices of Yorkshire West Riding* (1833), 5 B. & Ad. 673; and *post*, pp. 498 *et seq.*, as to control of King's Bench over sessions practice.

(*q*) *R. v. Justices of Salop* (1819), 2 B. & A. 694, appeal against conviction on a Game Act.

for a particular session ; the appeal was there respited at the instance of the appellants ; and the question at the second sessions was, whether the appellant, after such respite, was obliged to prove service of a notice to try at that session. Patteson, J., said, " If that is necessary, it must be so either by the practice of the sessions or by general rules of law. Now, *R. v. Lambeth* (*ubi sup.*) shows that the latter do not require such a notice ; nor is any rule of practice at the sessions produced requiring it. If any had been shown, it might perhaps have been too much to say that such a practice was illegal, and ought not to be abided by" (*r*). Indeed, in a former case not then cited, Abbott, C. J., had declared the rule of practice at the Bucks sessions—that in case of an appeal respited at the instance of either of the parties, fresh notice of trial should be given—was very reasonable, though in that case, which was very peculiar, as the postponement of the appeal took place in consequence of an equal division of the magistrates, that rule was disregarded, it being considered that an adjournment rather than a respite had taken place (*s*).

Where a notice of appeal (against a rate) containing the grounds of appeal, was served in due time for trial at the first sessions, and was ready for proof there, but was not proved or admitted, the respondents obtaining an order of respite on payment of costs, whereupon the notice was handed to the clerk of the peace, who made out the order of respite, inserting in it the grounds of appeal: the King's Bench held that, as the respondent had acted on the notice, the appellant was entitled to be heard at the following sessions without proving any notice of appeal (*t*). No practice of the sessions appeared in the case last cited. However, in a previous instance, where the hearing of an appeal had been respited to the next sessions on the respondents' motion, and for their accommodation in the absence of a witness, it was held that a rule of the quarter sessions' practice—that in cases of respited appeals ten days' notice in writing shall be given by appellants to respondents—did not apply to the case before them, in which the respondents by desiring to respite the appeal agreed in effect to be ready to try at the next sessions without notice (*u*). The Legislature having only required reasonable notice of appeal against an order of removal, the sessions have no power to require any other notice, *e.g.*, by resolving, that whenever an

Proof of notice of appeal upon hearing after respite.

(*r*) *R. v. Justices of Yorkshire (West Riding)* (1833), 5 B. & Ad. 673, 674 ; *R. v. Justices of Monmouthshire* (1835), 3 D. P. C. 306, *post*.

(*s*) *R. v. Justices of Bucks* (1825), 6 D. & R. 142.

(*t*) *R. v. Justices of Herts* (1833), 4 B. & Ad. 561.

(*u*) *R. v. Justices of Lindsey* (1817), 6 M. & S. 379. Bayley, J., added that the sessions' rule of practice applied only to the common case of entry and respiting an appeal, which is done in many cases as a matter of course, the appellants not having then fully satisfied themselves of all the facts of the case.

appeal, against an order of removal, shall be entered and respited, notice thereof shall within one month after such entry and respite be given to the officers of the removing parish (*x*).

Where an appeal against an order of removal was entered and respited by the *appellants* at a particular sessions, in pursuance of previous notice to that purpose, as also that the appeal would be tried with effect at the *following* sessions, the court is reported to have held in one case that a negotiation for arrangement, which went off in the interval, did not exonerate the appellants from giving, according to the practice of the sessions, the usual, viz., a fresh notice to try at the second sessions, before they could be heard there (*y*). An adjournment of an appeal to the following sessions, on account of an equal division of opinion on the bench, will not oblige an appellant to give fresh notice of trying it, though that be the usual practice on adjourned appeals (*z*). But where an appellant gave due notice of appeal against commissioners' accounts and that a respite would be moved for, the respite was granted, the respondents not consenting to refer the accounts. At the next sessions a further respite was applied for, the respondents still refusing to refer. The appeal was then called on, and on the respondents requiring proof of notice of trial after the respite, the sessions dismissed the appeal for want of such proof; it was held, that in the absence of any statutory enactment requiring such notice or practice of sessions, the sessions must hear the appeal (*a*).

Hearing of
the appeal.

There seems no general rule requiring the personal attendance of the appellant, and the necessity for this depends in a great measure upon the practice of each sessions respectively (*b*).

In the case of an appeal against a conviction, where the appellant is liable to be committed to prison without the option of a fine in the event of the dismissal of his appeal, it is submitted that his presence at the hearing of the appeal may reasonably be required, but that, speaking generally, it would not be reasonable to require his personal attendance in any other case.

After notice of countermand of appeal against an order of removal, though it arrive too late to be of effect according to the practice of the sessions, the sessions have no jurisdiction to hear the appeal at the instance of the respondents in the absence of the appellants, and an order which stated that no

(*x*) *R. v. Justices of Norfolk* (1834), 5 B. & Ad. 990; *R. v. Justices of Surrey* (1849), 3 New Sess. Cas. 531; and see *R. v. Pawlett* (1873), L. R. 8 Q. B. 491.

(*y*) *R. v. Justices of Essex* (1820), 2 Chit. R. 385.

(*z*) *R. v. Justices of Bucks* (1825), 6 D. & R. 142.

(*a*) *R. v. Justices of Yorkshire West Riding* (1833), 5 B. & Ad. 667.

(*b*) *R. v. Cracklin*, Mich. 1822; Burn's J., tit. "Appeal," 30th ed. 240.

one appearing to prosecute the appeal, the order of removal was confirmed, was quashed (*c*); but where an appeal against an order of justices under the 11 Geo. 2, c. 19, s. 4, adjudging the payment of double the value of goods fraudulently removed, was duly entered and was afterwards dismissed by the sessions upon motion of the respondents without hearing, owing to the absence of the appellant's attorney and counsel not being briefed by him, and the sessions, although applied to on the same day on behalf of the appellants, refused to reopen the appeal except on the terms of payment of full costs, the Court of Queen's Bench refused to interfere by mandamus (*d*).

If the respondents do not appear to support the matter appealed against, the appellants must prove that the necessary preliminaries to the appeal to be performed by them have been performed, as, for instance, that notice of appeal has been duly given, or recognizances, if required, been duly entered into, and until then they are not in a position to ask for the order or conviction to be quashed unless the respondents consent in open court that the order, &c. be quashed, or unless the respondents have waived any objections they might otherwise have made to the regularity of any such notice. If on an appeal against a conviction the prosecutor do not appear at the sessions as a respondent in support of the conviction, as the onus lies upon him, it becomes the duty of the court to give effect to the appeal, and to quash the conviction upon the presumption that the prosecutor is unable to produce evidence sufficient to support it (*e*). Appearance of respondents.

When the appeal is brought regularly before the sessions by the proof, or on the admissions above described, and is not adjourned, the leading counsel for the respondents, as the party sustaining the order or other act complained of, opens his case on the merits, and adduces evidence in support of it (*f*), without being confined to that produced before the magistrates below (*g*). Although the parties on the hearing Respondents' case.

(*c*) *R. v. Stoke Bliss* (1844), 13 L. J. M. C. 151; see *R. v. Justices of West Riding* (1843), 5 Q. B. 1.

(*d*) *R. v. Justices of Lancashire* (1838), 2 Jur. 468.

(*e*) *R. v. Purdey* (1864), 34 L. J. M. C. 4.

(*f*) But where, by the practice of the sessions, the appellant was bound to begin, even in an appeal against a poor rate, and the appeal was dismissed, for the appellant's refusal to begin, the court above refused to interfere: *R. v. Justices of Suffolk* (1817), 6 M. & S. 57; for this is a matter of practice of the sessions which the King's Bench Division will not review unless a serious miscarriage of justice has been caused.

(*g*) *R. v. Excise Commissioners* (1814), 3 M. & S. 133. In this case the appeal was not to quarter sessions, but to a specially constituted tribunal of appeal. But the principle is applicable to appeals to quarter sessions: *R. v. Pilgrim* (1870), L. R. 6 Q. B. 89; see also *R. v. Jeffreys* (1823), 1 B. & C. 604. By the Acts relating to the collection of inland revenue, no other witnesses besides those examined by the convicting justices

of an appeal are not restricted to the evidence or facts which were before the justices or other persons appealed from, yet if the further evidence adduced upon appeal is such as to take the opposite party by surprise, it may become necessary for the court to consider whether, in the interests of justice, an adjournment may not be necessary to enable the opposite party to meet the fresh evidence thus brought forward against him. It is conceived that, except, possibly, under very special circumstances, the King's Bench Division would not interfere to control the discretion of the quarter sessions in such a matter. And a distinction is to be observed between bringing forward, upon appeal, fresh evidence in support of the case which was sought to be made before the justices, and an attempt upon appeal to bring forward an entirely new case. Where a party, having had the opportunity of bringing forward the whole of his case in the court below, has deliberately abstained from setting up a matter which, if established, would have enabled him to succeed, and then brings such matter forward for the first time before the appellate tribunal, it may become a question whether he ought to be allowed to do so upon any terms whatsoever. In such a case justice certainly requires that if such new matter takes the adversary by surprise, an adjournment, if asked for, should be granted to such adversary to enable him to meet such new case, and such adjournment ought usually to be at the cost of the party bringing forward such new case. In one case, under 7 & 8 Will. 3, c. 6, s. 1 (*rep.*), where a person had been summoned before two justices for non-payment of tithe, and was ordered to pay the tithes demanded, and did not raise any question of *modus*, but afterwards appealed to the sessions, and there for the first time set up a *modus*, and tendered evidence to prove it, it was held that the sessions were right in having in the exercise of their discretion rejected the evidence. It was a question in this case whether, by virtue of sect. 8 of the statute in question, the appellant was not bound, if he intended to rely upon a *modus*, to set it up before the justices in the first instance; and the judgment of Abbott, C. J., proceeded partly upon this narrow ground and partly upon the general principle, but Bayley, J., proceeded wholly upon the general principle, saying: "In the absence of any notice, and of any mention of the *modus* in the first instance, I think that the justices at sessions exercised a sound discretion when they rejected the evidence tendered" (*h*). Justice would, doubtless, generally be done in such a case by granting adjournment at the cost of the appellant, or, if the appellant had given sufficient notice of his intention to bring forward such new

are to be re-examined at the sessions on appeals: and see *Breedon v. Gill* (1697), 1 Ld. Raym. 219.

(*h*) *R. v. Jeffreys* (1823), 1 B. & C. 604.

ground of appeal, by depriving him of costs in the event of his appeal succeeding, but the case above referred to is an authority for the proposition that in a proper case the quarter sessions may, in the exercise of their discretion, shut out such new matter altogether. Where a "further appeal" was given from the decision of an appeal by borough sessions to sessions for the county, the appellant was not suffered to urge any grounds of appeal other than those stated in the notice, though, as it seems, he might bring fresh evidence in support of the latter (*i*).

The reason for the practice of respondents in general beginning, is put by Lord Kenyon, who draws the distinction between appeals at sessions and other appeals, thus (*k*): "In writs of error and appeals to the House of Lords, where each party is in possession of all the evidence on both sides, the party who impeaches the decision below always begins; but in a case of this kind (an appeal against a poor rate), where it is an *ex parte* proceeding, and where the appeal comes on to be heard naked and destitute of all evidence before the court, those who have done the act ought to establish the propriety of it by evidence" (*k*). However, where objections of form are raised to convictions for matter apparent on the face of them, the appellant's counsel begins by stating all of them in one address, so that they may be answered by the opposite counsel, and decided on by the bench in like manner (*l*). If no such objections are taken, or if they are overruled, or if such objections prevail, but are met by an amendment under 12 & 13 Vict. c. 45, s. 7, the respondent opens his case in support of the conviction on the merits. By 12 & 13 Vict. c. 45, s. 7, it is enacted, that if upon the trial of any appeal to any court of general or quarter sessions of the peace against any order or judgment made or given by any justice or justices of the peace, any objection shall be made on account of any omission or mistake in the drawing up of such order or judgment, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justice or justices making such order or giving such judgment to have authorized the drawing up thereof free from the said omission or mistake, it shall be lawful for the court, upon such terms as to payment of costs as it shall think fit, to amend such order or judgment, and to adjudicate thereupon as if no such omission or mistake had existed.

Who to begin.

Amendment of order or conviction.

The decision of the sessions as to the amending or refusing to amend any order or judgment appealed against is final and

Decision of sessions as to amending

(*i*) *R. v. Justices of Suffolk* (1818), 1 B. & A. 640.

(*k*) *R. v. Newbury (Inh.)* (1791), 4 T. R. 476; see *R. v. Knill* (1810), 12 East, 50; and *post*, as to rates, Chap. IV.

(*l*) 1 Burn's J., 30th ed. 243.

order, &c.
final.

not liable to be reviewed by the Court of King's Bench (*m*). Under the term judgment convictions are concluded (*n*). Similar powers of amendment are conferred, as to lunacy orders, by the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 308.

The particular course of trying appeals against poor rates, orders of removal, &c., is treated more at large under those heads, *post*.

Evidence on
appeal.

Where quarter sessions are ordered to re-state a case stated by them they must re-hear the case (for the bench may not consist of the same persons (*o*)), and upon such re-hearing they may receive further evidence (*p*). If the sessions quash a conviction on appeal for matter of form, and it appears to the King's Bench Division on *certiorari* that there is no defect in form, the case will be sent back to the sessions to be heard on its merits (*q*). But upon an order of sessions quashing a conviction for matter of form, being itself quashed by the King's Bench Division upon *certiorari*, it is in the discretion of the King's Bench Division whether it will order the quarter sessions to re-hear the appeal upon the merits. If the King's Bench Division does not direct a re-hearing of the appeal on the merits by the quarter sessions, the result is that the original conviction is set up again, and definitely confirmed, for, in such case, the appellant cannot afterwards go to sessions and get the appeal re-heard. Thus, in *R. v. Allen* (*r*), the Court of King's Bench refused to direct a re-hearing, upon the ground that the appellant, by taking a technical objection at the sessions, had waived his right to have his appeal heard upon the merits.

Where the quarter sessions dismissed an appeal upon a point of practice, but at the instance of the appellants granted a case, which, however, the appellants did not think proper to proceed upon, the Court of King's Bench refused a mandamus (*s*).

(*m*) 12 & 13 Vict. c. 45, s. 9, *ante*, p. 447.

(*n*) Paley on Conv., 7th ed. 310.

(*o*) *Per* Patteson, J., in *R. v. Bloxam*, *infra*.

(*p*) *R. v. Bloxam* (1834), 1 A. & E. 386.

(*q*) *R. v. Ridgway* (1822), 5 B. & A. 527; *R. v. Frieston (Inh.)* (1833), 5 B. & Ad. 597. Where the quarter sessions have improperly decided against an appeal on a preliminary objection, the King's Bench will grant a mandamus to them to enter continuances and hear the appeal. But where an objection has been made, during the trial of an appeal, to the reception of a particular piece of evidence, and the sessions have held such objection valid, in consequence of which the appeal has been dismissed, this court will not interfere unless the sessions send up a case. There is no jurisdiction in the King's Bench to review a wrong judgment of quarter sessions on a question of evidence unless a case is stated. "There is no instance in which the court has granted a mandamus under such circumstances": *per* Patteson, J.

(*r*) (1812), 15 East, 333.

(*s*) *R. v. Justices of West Riding* (1834), 1 A. & E. 606. The refusal of the mandamus in this case was in accordance with the well-settled rule that mandamus, being a discretionary writ, will not go where the prosecutor has another equally convenient and efficient remedy open to him.

When the case of the party who begins is closed, the practice would now seem to be, following the statutory provisions relating to causes *at nisi prius* as well as criminal trials (*t*), for the counsel who began, in the event of the opposite party or his counsel not announcing his intention to adduce evidence, to address the court a second time for the purpose of summing up the evidence, and then the counsel for the opposite party addresses the court. If he calls no witnesses, the discussion closes with his address; if he calls witnesses, he sums up the evidence, and the leading counsel for the party who began replies; but at some sessions there is this variation from it: that where there are two counsel engaged for one party, and witnesses are called for that party, the junior has the privilege of summing up the evidence given for his clients at its conclusion. But in no case has he this right unless when his leader calls witnesses, so as to be enabled to make a second speech on the case of his adversary. On all collateral points of law which may arise, the court may hear as many counsel as the parties think fit to employ. But it is not always necessary to do so, or to hear the argument to its end; as the court may call at once on the counsel against whom their opinion inclines, and if that opinion is not shaken by his arguments, may at once decide.

Speeches of
counsel.

The rules of evidence and of examination are exactly the same in cases of appeal as in the trial of civil or criminal matters, as the case may be.

The justices are, in all cases of appeal to them, the absolute judges of the facts: no bill of exception lies (*u*), and they may not, even if they desire it, remit any question of *fact* to a superior tribunal. They are also, whilst acting within their jurisdiction, if they think fit, the absolute judges of the law; for they cannot, under any circumstances, be required to take the opinion of the judges of assize, or of the King's Bench Division (*x*); but where the *certiorari* is not taken away by express words, they may remit a case on proved or admitted facts to that court (*y*). Formerly, where the *certiorari* was taken away, the reservation of a case could be of no avail, as the court above could take no cognizance of the proceedings (*z*), but now, by sect. 40 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), a writ of *certiorari* shall not be required for the removal of any conviction order or other determination in relation to which a special case is stated by a court of quarter sessions (*zz*).

Sessions ex-
clusive judges
of facts.

The principle that judicial power cannot be delegated by Sessions can-
not in general

(*t*) See C. L. P. Act, 1854, s. 18; and 28 Vict. c. 18.

(*u*) *R. v. Preston-on-the-Hill* (1736), Burr. Sett. Cas. 77.

(*x*) *R. v. Oulton* (1735), Burr. Sett. Cas. 64; *R. v. Justices of Carnarvon* (1820), 4 B. & A. 86. (*y*) As to the special case, see *post*.

(*z*) *R. v. Justices of Middlesex* (1826), 8 D. & R. 117; *R. v. Allen* (1812), 15 East, 333.

(*zz*) But it would be singular if a mere amendment in procedure had

delegate their authority. those to whom it is intrusted (*a*), applies to the jurisdiction of a court of quarter sessions, which cannot in general delegate its authority to a third party as referee to decide an appeal for it (*b*). However, by consent of the parties or their attornies, it seems that the sessions may hand over the consideration of the matter in dispute to third persons, or to a committee of their own body in order to report to them; and may adopt the report and make an order accordingly (*c*); and it was said in *R. v. Harding* (*ubi sup.*) that the sessions may refer a thing to another to examine and make report to them for their determination independently of any consent.

Again, where the subject-matter is a public trust reposed in the justices, *e.g.*, building or repairing a county bridge, so that no individuals are parties, they may of their own motion refer it to a committee of their own body, and afterwards adopt their report; for it may be proper to acquire information out of the sessions (*d*); and for that purpose may adjourn the further consideration of the matter to any future sessions (*e*); but see now as to the power to refer an appeal to an arbitrator under the 12 & 13 Vict. c. 45, ss. 12 *et seq.* (*f*).

Special entry
of judgment.

When judgment on an appeal against an order of removal is quashed on some formal ground, the justices may direct a special entry by the clerk of the peace, that it is "quashed for form only," in order to prevent the judgment from being conclusive on a subsequent appeal (*g*). But the King's Bench Division has no authority to compel the quarter sessions by mandamus to give their reasons for their judgments, or to

the effect of giving an appeal where none lay previously. Possibly the question would turn upon the consideration of the reason why the statute in question took away the *certiorari*. If the court should think that the reason why *certiorari* was taken away was in order that sessions should be the sole and unappealable judges both of fact and of law in cases within the statute, then the circumstance that a *certiorari* is no longer necessary to bring up a case stated for the King's Bench Division would, it is submitted, scarcely be considered a sufficient reason for letting in an appeal in such cases. If, on the other hand, the view should be taken that the only reason why the Court of King's Bench could not entertain a case stated was because of the technical and merely procedural difficulty that without a *certiorari* it could not be brought before them, then the abolition of the *certiorari* would seem to have removed the difficulty, and thus to have let in procedure of appeal by way of case stated.

(*a*) See Bac. Abr. tit. "Offices," (A).

(*b*) *R. v. Townsend* (1711), 16 Vin. Abr. 417; 2 Nolan, 4th ed. 468; *R. v. Harding* (1696), 2 Salk. 477.

(*c*) *R. v. Justices of Northampton* (1777), Cald. Sett. Cas. 30 (reference to a committee); *R. v. Natland* (1774), Burr. Sett. Cas. 793 (cited 5 Tyr. R. 1056; 2 C. M. & R. 377) (reference to a judge of assize); *R. v. Harding, sup.* The clause in the commission of the peace forbidding the justices to proceed to judgment in a case of difficulty unless in the presence of a judge of assize, was not referred to in *R. v. Natland*, which treated the reference to the judge of assize upon the same footing as a reference to any other person.

(*d*) *R. v. Justices of Glamorganshire* (1793), 5 T. R. 279.

(*e*) *R. v. Justices of Westmoreland* (1868), L. R. 3 Q. B. 457.

(*f*) *Post*, 481.

(*g*) See 4 Burn's J. p. 798, 30th ed. tit. "Poor."

make any special entries upon their records (*h*). If the sessions quash an order on appeal, and, upon the removal of the proceedings into the King's Bench Division upon *certiorari*, it appear that such order was good in form, the court must intend that it was reversed on the merits. But if in such case it should appear that the order was not good in point of form, the court must intend that it was quashed for form. At any rate this was the rule before power was conferred upon quarter sessions to amend formal defects in judgments and orders appealed against by 12 & 13 Vict. c. 45, s. 7 (*i*). The powers of amendment given by that section apply only to orders and judgments of justices of the peace out of sessions. Whatever alteration this section may have introduced into the rule, therefore, in cases of orders or judgments of justices of the peace out of sessions, reversed in sessions, it leaves the rule in other cases unaffected. Of course, the rule did not apply to cases where the quarter sessions stated a case for the opinion of the Court of Queen's Bench. In point of form, when an appeal is heard against an order or conviction, the judgment is "order confirmed," or "order quashed," as the case may be, but when the appeal is not heard it should be "appeal dismissed" (*k*). Where, after an appeal had been entered, and twice respited at the instance of the appellant, the respondents before the next session gave notice that they would not oppose the appeal, so that it was allowed accordingly, and the rate quashed without opposition, the appeal was held to be by such allowance *heard* and *determined* within 17 Geo. 2, c. 38, s. 4, so as to entitle the appellant to costs (*l*).

When the proceedings are closed, the chairman collects the opinions of the justices, and pronounces that of the majority for confirming or quashing the order, conviction or rate which is the subject of the appeal. The justices who made the order (*m*), or who are rated inhabitants of either of the parishes litigating a rate, are disqualified from voting (*n*).

So is a deputy recorder who is a rated inhabitant in a parish in a union where the appeal was between two other parishes of the same union respecting the valuation of rateable property when the parishes contributed to a common fund (*o*). Such deputy recorder is not within 16 Geo. 2, c. 18,

Judgment, by whom given.

Interested justices disqualified from giving judgment.

(*h*) *South Cadbury v. Braddon* (1710), 2 Salk. 607; *R. v. Justices of Devon* (1819), 1 Ch. R. 34; see *R. v. Justices of Cornwall* (1767), 4 Burr. 2102.

(*i*) *South Cadbury (Inh.) v. Braddon* (1710), 2 Salk. 607.

(*k*) *Per Erle, J., R. v. Binney* (1853), 1 E. & B. 815.

(*l*) *R. v. Cawston* (1824), 4 D. & R. 145.

(*m*) *Foxham tithing case* (1703), 2 Salk. 607; *R. v. Justices of Hertfordshire* (1845), 6 Q. B. 753.

(*n*) *R. v. Yarpole* (1790), 4 T. R. 71; and see *R. v. Gudderidge* (1826), 4 D. & R. M. C. 35; *Great Charter v. Kennington* (1742), Stra. 1173; *R. v. Justices of Hertfordshire, sup.*; *R. v. Cheltenham Commissioners* (1841), 1 Q. B. 467; *R. v. Justices of Suffolk* (1852), 21 L. J. M. C. 169. See generally as to disqualifications, *ante*, p. 41 *et seq.*

(*o*) *R. v. The Recorder of Cambridge* (1857), 27 L. J. M. C. 160.

which gives power to justices of a county, city, borough, &c. to act in things relating to their office, so far as the same relates to the poor laws, &c., notwithstanding they are rated to or chargeable with the taxes and rates within such parish, &c. affected by such Acts (*p*).

A magistrate making the order appealed against, and one who is a creditor of a turnpike trust, having money owing to him which was secured solely upon the tolls of the trust, are interested in the event of an appeal against an order that part of the assessment, levied under 5 & 6 Will. 4, c. 50, should be paid by the surveyor of highways of a parish to the commissioners of the turnpike trust, to be laid out in the repair of such part of the turnpike road as lay in the parish (*q*).

Duty of
interested
justice to
withdraw.

It is the duty of an interested justice voluntarily to withdraw from the court when the appeal is called on (*r*). The decision of the court, of which an interested justice forms a member, is vitiated whether the majority turns upon his vote or not, and whether his interference had any influence or not (*s*). Where some of the magistrates, deciding an appeal against a conviction for an offence against a bye-law of a railway company, were shareholders in the railway company, the information being preferred on behalf of the company, the order of sessions affirming the conviction was quashed on *certiorari*, the court saying that there had been no appeal before a proper tribunal, and that the Act of sessions was null (*t*). But whilst any direct pecuniary interest, however small, in the subject-matter of inquiry, disqualifies a justice from acting judicially in the matter, the mere possibility of bias on the ground that the justices were trustees of property which might be improved by anything improving a borough fund, and the result of the justices' decision might be to improve the borough fund and thereby beneficially to affect the interest of their *cestui que trusts*, is not sufficient to disqualify the justice (*u*).

The interest of justices is cured as regards certain matters relating to poor law by 16 Geo. 2, c. 18, s. 1, but this does not apply to appellate matters. The section provides, that every justice of the peace for any county, &c., borough, &c., may do all acts appertaining to their office as far as the same relates to the relief, maintenance and settlement of the poor, to vagrants, repairs of highways, parochial taxes or rates, notwithstanding such justice is rateable to the taxes or rates within any parish affected by his acts; provided that (*x*) nothing shall authorize any of them to act in the determina-

(*p*) *R. v. The Recorder of Cambridge* (1857), 27 L. J. M. C. 160.

(*q*) *R. v. Justices of Hertfordshire* (1845), 6 Q. B. 753.

(*r*) *R. v. The Justices of Suffolk* (1852), 21 L. J. M. C. 169.

(*s*) *Ibid.*; *R. v. Justices of Herts*, *sup.*; *R. v. Cheltenham Commissioners* (1841), 1 Q. B. 467.

(*t*) *Re Hopkins* (1858), E. B. & E. 100.

(*u*) *R. v. Rand* (1866), 35 L. J. M. C. 157; *R. v. The Dean of Rochester* (1851), 20 L. J. Q. B. 467.

(*x*) Sect. 3.

tion of any appeal to quarter sessions for any county or riding at large, from any order or matter relating to the parish, &c. where such justice is chargeable. It is observable that the proviso only applies to counties and ridings, while the enactment applies to cities, liberties, franchises and boroughs. So, by 27 & 28 Vict. c. 39, s. 6, "No justice of the peace shall be disqualified for acting in the determination of any appeal against a poor rate at any quarter or special sessions by reason of such justice being rated or being liable to be rated in some other parish in the union than that for which the rate appealed against is made." And by the Justice of the Peace Act, 1867 (*y*), s. 2, a justice of the peace shall not be incapable of acting as a justice at any petty or special or general or quarter sessions on the trial of an offence arising under an Act to be put in execution by a municipal corporation or a local board of health, or improvement commissioners, or trustees, or any other local authority by reason only of his being as one of several ratepayers, or as one of any other class of persons liable in common with the others to contribute to or to be benefited by any fund, to the account of which the penalty payable in respect of such offence is directed to be carried, or of which it will form part, or to contribute to any rate or expenses in diminution of which such penalty will go.

Being a rate-payer not a disqualification on appeals against poor rates, when.

On appeals against offences against Local Government Acts.

Justices are not bound to give any reason for their judgment (*z*).

As to the judgment of the court.

They may alter their judgments at any time during the continuance of the same session at which they are made, but not after it has been ended by the departure of those magistrates who composed it (*a*).

The chairman has the same right to vote as any other justice present, but has no casting or double vote, in case the numbers including his own vote should be equal; for *inter pares non est potestas*.

Chairman has no casting vote.

In cases of equal division, the proper course is to continue the session by adjournment to some day not later than that on which the next original quarter session should be holden, and so on from session to session, if the question in doubt remains so long undecided by a majority (*b*). And there cannot be a better reason for an adjournment than that the justices have not made up their minds as to the judgment to be given (*c*). Where the justices were equally divided in opinion, and the chairman gave a casting vote in favour of

Judgment where justices equally divided.

(*y*) 30 & 31 Vict. c. 115.

(*z*) *South Cadbury v. Braddon* (1710), 2 Salk. 607; *ante*, p. 466.

(*a*) *St. Andrew Holborn v. St. Clement Dunes* (1703), Salk. 494, 606; *R. v. Justices of Leicestershire* (1813), 1 M. & S. 442.

(*b*) See *ante*, p. 458; *R. v. Justices of Monmouthshire* (1828), 8 B. & C. 137.

(*c*) *Keen v. The Queen* (1847), 16 L. J. M. C. 180. The entry upon the record in this case was "because the court here is not advised what judgment to give judgment is further respited, &c.": *R. v. King's Langley* (1698), 1 Ld. Raym. 481.

the order which was then confirmed, and on the following day the appellant's counsel protested against the legality of the decision, and an argument thereupon being heard, the justices then present determined to adhere to the former decision, the court held, on a case stated by the quarter sessions, that although the proceedings on the first day were irregular, they could not assume that the judgment on the second day was not a judgment upon the merits (*d*). If an interested justice has taken part in the hearing of an appeal, and (counting his vote) there is an equal division of opinion, and the appeal is accordingly adjourned to be re-heard at the next or at an adjourned sessions, the King's Bench Division will not interfere to compel the quarter sessions to enter judgment in accordance with the views of the majority of the disinterested justices, but will treat the order for adjournment as valid, and will leave the case to be re-heard accordingly (*e*). For "the court will not hold a sort of balloting-box to ascertain the votes that were given, or whether they were correctly cast up" (*f*).

So, if from the record of the quarter sessions, as certified to the King's Bench Division, it appear that judgment was in fact entered one way or the other, the court will not grant a mandamus to the sessions to re-hear the appeal upon the ground, suggested by affidavits, that the justices were divided in opinion, and that the judgment was entered by mistake, instead of an adjournment being entered (*g*).

Effect of equal division of the court without an adjournment.

It has been said to be the bounden duty of the clerk of the peace to enter an adjournment in the above case (*h*). In *R. v. Belton* (*i*), there was an appeal to quarter sessions under 9 Geo. 4, c. 61 (The Alehouse Act, 1828), from the refusal of justices out of sessions to grant a licence. The quarter sessions, as afterwards appeared, were equally divided in opinion, but at the time no mention was made of this, the chairman announcing that the appeal was dismissed. The Court of Queen's Bench held that the sessions in this case were not bound to adjourn, but were entitled to treat the difference of opinion as a dismissal of the appeal. But the ground of this decision was that *under the particular statute there in question there was no power to adjourn* the appeal to the next sessions. The decision must, it is submitted, also be taken to involve the proposition that, in such a case, there is no obligation upon the justices to adjourn the quarter sessions so as to enable them to re-hear the appeal at (what according to law

(*d*) *R. v. Fladbury (Inh.)* (1841), 10 A. & E. 706.

(*e*) *R. v. Justices of Monmouthshire* (1828), 8 B. & C. 137.

(*f*) *Per* Ellenborough, C. J., in *R. v. Justices of Leicestershire* (1813), 1 M. & S. 445.

(*g*) *R. v. Justices of Leicestershire, ubi sup.*

(*h*) *Bodmin v. Warltigen* (1749), 2 Bott, 6th ed. pl. 982.

(*i*) (1848), 11 Q. B. 379.

would be) the same sessions. As Lord Denman, C. J., pointed out: given the want of capacity to adjourn, the result of an equal division of opinion would be that the judgment of the court of quarter sessions would be that of the justices out of sessions.

If there has been no adjournment and the neglect to adjourn be with criminal intent, or occasions a failure of justice in any respect, an information will lie against the justices who attended the sessions; but where, from its being overlooked that the numbers for quashing were equal with those for confirming the order, judgment was entered to quash it, but the error was not noticed to the court during the session; a mandamus to re-hear the appeal was refused, on the ground that as the sessions had not doubted so far as to send up a case, but had actually given judgment, the court above could not look *dehors* the record, by scrutinizing the poll on which the judgment proceeded (*k*).

Neglect to adjourn.

We have already seen that there is authority for the proposition that, even in a case of fraud, the quarter sessions has no power to erase an entry in their records of what was done at a previous court without the authority of the King's Bench Division (*l*). If *R. v. Justices of Leicestershire* (*k*) was also well decided, to the effect that the King's Bench Division will not grant a mandamus to rectify an erroneous entry upon the records of the quarter sessions, where the judgment of the court has been wrongly entered, and that clearly appears, it is evident that the door is opened to admit a grave miscarriage of justice. It seems to be contrary to the maxim, *actus curie nemini facit injuriam*, to permit the mistake of an officer of the quarter sessions to affect the rights of parties. It is submitted that the doctrine of *R. v. Justices of Leicestershire* requires to be reconsidered. Of course, if the erroneous entry is discovered before the quarter sessions is over it may be corrected either at the actual sitting at which the matter was dealt with, or at any adjournment of the same sessions. Lord Ellenborough, C. J., in *R. v. Justices of Leicestershire*, said: "If any error was made in the entry of the clerk of the peace, that error should have been pointed out at the sessions, while the court was sitting, and competent to reform its own errors, and to draw out a more correct judgment."

If the doctrine of *R. v. Justices of Leicestershire* is to be upheld in its integrity, *semble*, that it must be on the principle that it is the business of the parties to proceedings at sessions to see that the clerk of the peace correctly enters up the proceedings, a course of practice which, it is submitted, would be in most cases inconvenient, and in some cases impracticable.

(*k*) *R. v. Justices of Leicestershire* (1813), 1 M. & S. 442.

(*l*) *R. v. Justices of West Riding* (1843), 5 Q. B. 1.

SECTION 5.

OF COSTS OF APPEALS.

The power to give costs is not incident to the authority of the sessions, nor does it exist at common law: and, therefore, they never can be given, unless by the words of the particular Act under which the justices are acting at the time.

Under Baines' Act.

But now, by 12 & 13 Vict. c. 45, s. 5, "Upon any appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as may to such court appear just and reasonable, such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction by the 11 & 12 Vict. c. 43."

And the sessions must always exercise their judgment on the amount of costs to which the successful party is entitled (*n*); and they have accordingly no right to make a rule fixing the amount of costs to be allowed in certain classes of appeals; *ex. gr.*, 40s. as the costs to be allowed on a removal order being quashed. But they may make a standing order to the effect that in all cases costs shall abide the event, unless the court shall otherwise determine (*o*).

Order as to costs form part of the judgment.

Whenever the sessions grant costs, they form part of the judgment of the court, and the amount must be ascertained by and in the order itself (*p*); and where a statute requires the sessions on dismissing an appeal to award costs to the respondents, and the order dismissing the appeal does not so award costs, the order is bad *in toto* and cannot be enforced (*q*). If the order confirming or quashing the order, &c. be made subject to a case, the costs should be adjudged at the time of the making of the order subject to the case, for an order subject to a case is in the nature of a judgment *nisi*, and the court upon making it becomes *functus officio*, and subsequent sessions have no power to make any order as to costs in such a case (*r*); and so when, by order of the court, an appeal is referred to arbitration under 12 & 13 Vict. c. 45, s. 13 (*s*), the order must provide for the costs, and neither the arbitrator, nor the sessions at which the award is entered, as the

(*n*) *R. v. Justices of Merioneth* (1841), 6 Q. B. 163; *R. v. Justices of Glamorganshire* (1850), 1 L. M. & P. 336.

(*o*) *Freeman v. Reed* (1860), 30 L. J. M. C. 123.

(*p*) *Sellwood v. Mount* (1841), 10 L. J. M. C. 121.

(*q*) *Ibid.*

(*r*) *R. v. Justices of Staffordshire* (1857), 7 E. & B. 935.

(*s*) *Post*, p. 481.

judgment of the court, have any power to award them (*t*): and where the order as to costs is made to abide the event of a case stated to the King's Bench Division, and that court gives judgment, but says nothing as to costs, the costs cannot be obtained, inasmuch as the sessions have no longer jurisdiction to ascertain the costs (*u*). The sessions have no power to grant costs generally, to be afterwards taxed by the proper officer; though they may direct the clerk of the peace to ascertain and report to them the items of expenditure which may form the grounds of their decision; but they must themselves determine the sum to be paid, for they cannot delegate their authority (*x*).

How ascer-
tained.

In one case a rule for a mandamus to the sessions to make an order for costs was made absolute without costs, on an undertaking that the order should be made without the mandamus issuing (*y*).

An order of sessions dismissing an appeal and giving costs to the respondents cannot be divided so as to separate the part relating to costs from the other part, so that if the former part is invalid, as made without jurisdiction, the order as to costs cannot be upheld (*z*). Sometimes, when notice of appeal is given and not countermanded, the practice is to refuse the appellant leave to enter and respite his appeal, unless he agrees to pay the costs of the day (*a*). Before 12 & 13 Vict. c. 45, s. 6 (*post*, p. 477), in the case of an appeal against a poor's rate, unless the appeal had been entered the sessions could not order the appellant to pay the costs which he might have occasioned to the respondents in preparing to resist it, for it had not been "heard and determined" (*b*): but if it is entered and respited, and opposition to it is afterwards abandoned, and the appeal is accordingly allowed without opposition, the appellant is entitled to costs as upon an appeal which has been "heard and determined" (*c*). Where an appeal against a poor rate is entered and respited and afterwards abandoned, the respondents are entitled to their costs down to the time of abandonment (*d*).

By 11 & 12 Vict. c. 43, s. 27, it is enacted, That after an appeal against any such conviction or order as aforesaid, After appeal against con-

(*t*) *R. v. Justices of West Riding* (1865), 6 B. & S. 531; *West London Extension Railway v. Fulham Union* (1870), 39 L. J. Q. B. 178; *R. v. Justices of Middlesex* (1871), 40 L. J. M. C. 109.

(*u*) *R. v. Justices of Hampshire* (1862), 32 L. J. M. C. 46.

(*x*) *R. v. Skinn* (1741), 1 Bott, by Const. 527; *R. v. Wargrave* (1805, 2 Nolan's P. L. 574; *R. v. Sweet* (1807), 9 East, 25; *Sellwood v. Mount* (1841), 10 L. J. M. C. 121.

(*y*) *R. v. Justices of West Riding* (1862), 31 L. J. M. C. 271.

(*z*) *R. v. Stoke Bliss* (1844), 6 Q. B. 158.

(*a*) *R. v. Justices of Monmouthshire* (1831), 1 B. & Ad. 895. For instances of actions brought upon agreements to pay costs, see *Porter v. Cooper* (1834), 6 C. & P. 354; *King v. Taylor* (1834), 5 Tyr. 804.

(*b*) *R. v. Justices of Essex* (1800), 8 T. R. 583, on 17 Geo. 2, c. 38, s. 4.

(*c*) See *R. v. Causton* (1824), 4 D. & R. 445, *ante*, p. 467; *R. v. Justices of Cambridge* (1834), 2 A. & E. 374.

(*d*) *Ex parte Holloway* (1831), 1 D. P. C. 26.

viction or order, justice may issue warrants of distress for execution of the same.

Costs of appeal, how recovered.

Order for costs.

i.e., referred to in that Act, shall be decided, if the same shall be decided in favour of the respondents, the justice or justices who made such conviction or order, or any other justice of the peace of the same county, riding, division, liberty, city, borough or place, may issue such warrant of distress or commitment as aforesaid for execution of the same, as if no such appeal had been brought; and if upon any such appeal the court of quarter sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace of such court, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and if the same shall not be paid within the time so limited, and the party ordered to pay the same shall not be bound by any recognizance conditioned to pay such costs, such clerk of the peace or his deputy, upon application of the party entitled to such costs, or of any person on his behalf, and on payment of a fee of one shilling, shall grant to the party so applying a certificate (No. XXXIX.) that such costs have not been paid; and upon production of such certificate to any justice or justices of the peace for the same county, riding, division, liberty, city, borough or place, it shall be lawful for him or them to enforce the payment of such costs by warrant of distress (No. XL.) in manner aforesaid, and in default of distress, he or they may commit (No. XLI.) the party against whom such warrant shall have issued in manner hereinbefore mentioned, for any time not exceeding three calendar months, unless the amount of such costs, and all costs and charges of the distress, and also the costs of the commitment and conveying of the said party to prison, if such justice or justices shall think fit so to order (the amount thereof being ascertained and stated in such commitment), shall be sooner paid.

What appeals within Baines' Act, s. 5.

The 5th section of 12 & 13 Vict. c. 45 (*d*), includes an appeal where there has been a decision, though the effect of the decision was that the appeal was dismissed on the ground that the sessions had no jurisdiction to try the appeal (*e*); and it is cumulative and extends to all appeals, whether the appellant has entered into a recognizance conditioned to pay costs or not (*f*).

The above 5th section, however, does not apply where the Crown is a party, and therefore on an appeal from the decision of justices on an information by an excise officer, there is no power in the court to order costs to a successful defendant (*g*). Where a man, convicted as a rogue and vagabond, appeals to the sessions, having duly given notice of appeal to the convicting justices, as required by the statute, and no one

(*d*) *Ante*, p. 472.

(*e*) *R. v. Padwick* (1858), 27 L. J. M. C. 113.

(*f*) *Freeman v. Read* (1860), 30 L. J. M. C. 123; *R. v. Huntley* (1854), 23 L. J. M. C. 106; *R. v. Justices of Ely* (1855), 25 L. J. M. C. 1.

(*g*) *R. v. Beadle* (1857), 26 L. J. M. C. 111.

appears to support the conviction, costs cannot be awarded against the convicting justices. In such a case the prosecutor before the justices out of sessions is the person to be ordered to pay costs to the appellant (*h*).

The expression "party or parties" in the above section is not limited to the formal parties to the appeal (*viz.*, the appellant and respondent), but applies to the substantial complainant. Thus, upon an appeal against a conviction under the Vagrant Act (*i*), though the convicting justices were respondents and the convicted person the appellant, and notice of appeal (pursuant to the statute) was given to the justices only, yet the court of quarter sessions, on quashing the conviction, ordered the informant, and not the justices, to pay the costs to the appellant, and it was held that the court was right in so doing (*k*). In appeals under this Act, and it is submitted by parity of reasoning in appeals under any other Act where notice of appeal is required to be given to the justices only (*kk*), and not to the informer or complainant upon whose information or complaint the Act appealed against was done, the informer or complainant, in the case of an appeal, is "the other party" liable for costs within the meaning of 12 & 13 Vict. c. 45, s. 5, and not the justices, who are the formal respondents, and it is immaterial whether such informer or complainant appears before the quarter sessions to support the conviction or order complained of (*l*).

An order for costs on an appeal made under the 5th section should order them to be paid to the clerk of the peace, to be

"Party or parties," who.

"Party or parties" to appeal, who.

To whom costs to be ordered to be paid.

(*h*) *R. v. Purdey* (1864), 34 L. J. M. C. 4.

(*i*) 5 Geo. 4, c. 83.

(*k*) *R. v. Smith* (1860), 29 L. J. M. C. 216; *R. v. Justices of Hants* (1830), 1 B. & Ad. 654; *R. v. Purdey* (1864), 34 L. J. M. C. 4.

(*kk*) In an appeal under the Alehouse Act, 1828 (9 Geo. 4, c. 61), against a decision of licensing justices the quarter sessions have no power under s. 27 of that Act to order the respondent justices who appear and oppose to pay a successful appellant's costs. *R. v. Justices of Staffordshire*, [1898] 2 Q. B. 231.

(*l*) In *R. v. Smith* (1860), 29 L. J. M. C. 216 (Vagrant Act), the informer was bound over by the convicting justices to give evidence at the sessions upon the hearing of the appeal, and he accordingly attended and gave evidence. Hill, J., in giving judgment, spoke of the informer as having been "heard on the other side" at sessions, but it does not appear from the report that the informer did more than give his evidence. But, in deciding that the informer was liable for costs, the judge did not proceed upon the ground that he had taken any active part at sessions upon the hearing of the appeal. In both *R. v. Purdey*, *sup.* (Vagrant Act), and in *R. v. Justices of Hants*, *sup.* (Turnpike Act), the informer was held liable for the successful appellant's costs, although in neither case did the informer attend at sessions. The words of sect. 5 of 12 & 13 Vict. c. 45, are "the party or parties appellant whom the same" (*i.e.*, the appeal) "shall be decided." In *R. v. Justices of Hants* the words were "the party appealed against." Lord Tenterden, C. J., in that case thus stated the grounds of the informer's liability: "The question is, what is the meaning of the words 'the party appealing or appealed against'?" The party appealing here is manifestly the party convicted; and if that be so, the informer is the only person who can satisfy the words *party appealed against*." In *R. v. Goodall* (1874), 43 L. J. M. C. 119 (Criminal Law Amendment

by him paid over to the successful party, for this is the mode of payment provided by 11 & 12 Vict. c. 43, which is incorporated by reference in sect. 5 (*m*); but the 5th section is cumulative, and does not abrogate a prior statute giving the costs direct to the party without the intervention of the clerk of the peace, as, for instance, the 17 Geo. 2, c. 38, giving costs on an appeal against a poor rate (*n*), or the 9 Geo. 4, c. 61, giving costs on an appeal against the refusal of justices to grant a licence (*o*); and, accordingly, in all such cases, the order is valid and enforceable whether it direct the costs to be paid to the successful party or to the clerk of the peace, to be by him paid over to the successful party; but in the case of an appeal against a summary conviction or order within the 11 & 12 Vict. c. 43, the order giving costs will be bad if it is not made in the form directed by the 27th section of that Act, and must therefore direct the payment to be made to the clerk of the peace (*p*). The section also requires that such order "shall state the time within which such costs shall be paid." Where the *certiorari* was taken away by a local Act, and an order made on appeal against a rate made under the local Act by the quarter sessions dismissing the appeal, ordering the costs to be paid directly to the party instead of to the clerk of the peace, the court refused to set it aside as made without jurisdiction, for such an error in the order was a mere defect in form, and cured by the clause taking away *certiorari* (*q*).

Costs occasioned by frivolous grounds of appeal.

By 12 & 13 Vict. c. 45, s. 4, if in any notice of appeal the appellant or appellants shall have included any ground or grounds of appeal which shall in the opinion of the court determining the appeal be frivolous or vexatious, such appellant or appellants shall be liable, if the court shall so think fit, to pay the whole or any part of the costs incurred by the

Act, 1871—threats and molestation of workmen), notice of appeal was required to be given to the convicting court of summary jurisdiction and to the other party. The quarter sessions were empowered by the Act to make such order as to costs to be paid *by either party* as they might think just. It was held that no order could be made against the convicting justices. In this case the justices did not appear at sessions. It is submitted that the rule must have been the same if they had done so. *Per curiam*, Cockburn, C. J., Blackburn, Quain and Archibald, JJ.: "Upon proper cause shown this court may punish officiousness on the part of magistrates in the exercise of their summary jurisdiction, but there is no pretence for saying that the quarter sessions have any such power."

(*m*) *Gay v. Matthews* (1862), 33 L. J. M. C. 14.

(*n*) *R. v. Huntley* (1854), 23 L. J. M. C. 106.

(*o*) *R. v. Justices of Ely* (1855), 25 L. J. M. C. 1. The law relating to licensing appeal will be found more fully dealt with *post*, at p. 724.

(*p*) *R. v. Hellier* (1851), 21 L. J. M. C. 3. This case also shows that payment by the party of a sum of money on account of costs ordered to be paid by an invalid order is no waiver of his right to contest the validity of the order in any way in which it is open to him to raise such a question.

(*q*) *R. v. Binney* (1853), 22 L. J. M. C. 127. As a matter of fact, the order in this case was clearly valid upon the principle afterwards established by *R. v. Huntley* and *R. v. Justices of Ely*, *ubi sup*.

respondent or respondents in disputing any such ground or grounds of appeal, such costs to be recoverable in the manner hereinafter directed as to the other costs incurred by reason of such appeal.

By the 12 & 13 Vict. c. 45, s. 6, for the more effectual prevention of frivolous appeals, it is enacted, that any court of general or quarter sessions of the peace, upon proof of notice of any appeal to the same court having been given to the party or parties entitled to receive the same, though such appeal was not afterwards prosecuted or entered, may, if it so think fit, at the same sessions for which such notice was given, order to the party or parties receiving the same such costs and charges as by the said court shall be thought reasonable and just to be paid by the party or parties giving such notice, such costs to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction by 11 & 12 Vict. c. 43.

Costs occasioned by frivolous appeals.

Where notice of appeal is given which might have been acted upon, the court to which the appeal lay has jurisdiction to give costs under this section. Thus, where notice of appeal against an order of removal made by justices acting in and for a borough was given as to the next quarter sessions for the county, and the day before the quarter sessions for the borough to which the appeal really lay were held, the appellants gave the respondents notice, that having discovered that the appeal ought to have been to the borough, they abandoned the appeal to the county sessions: the respondents appeared at the borough sessions and obtained an order for their costs on the abandonment of the appeal, and the order was held to be rightly made (*r*).

Jurisdiction to give costs where notice of appeal was to wrong sessions.

In the last-mentioned case the appellants would seem to have abandoned their appeal under the impression that the notice of appeal which they had given, having been given to the wrong sessions, was invalid. This, however, was not so, for in *R. v. Recorder of Liverpool* (*s*), where an exactly similar mistake had been made, the appellants, upon discovering their error, instead of abandoning their appeal, as the appellants did in *R. v. Recorder of Leeds*, gave notice to the respondents of their intention to bring on their appeal at the borough sessions, and it was held that they were entitled to do so, and the recorder of the borough, who had refused to hear the appeal, was compelled by mandamus to do so, for, said the Court of Queen's Bench (*t*), the statement in the notice of appeal that the appeal would be made to the quarter sessions for the county was "merely an erroneous surplusage which could not mislead" (*u*). But if the appellants, having given notice for the wrong sessions, appear there and present their

Upon whom order to be made.

(*r*) *R. v. Recorder of Leeds* (1861), 3 E. & E. 561.

(*s*) (1850), 15 Q. B. 1070.

(*t*) Lord Campbell, C. J., Coleridge and Erle, JJ.

(*u*) In such a case, if the respondents are in fact misled, and the correction of the error comes too late to enable them to try at the proper

appeal, they cannot afterwards be heard to say that the mention in the notice of appeal of the wrong sessions was mere surplusage, and they will, in such a case, be bound by their notice (v).

Change of parties pending appeal.

In *Ex parte Overseers of Fletton* (x), the respondents were the churchwardens and overseers of the parish of F. Before the appeal was heard they went out of office, and fresh churchwardens and overseers were appointed. The new officers did not appear at sessions, and the appeal was allowed. The quarter sessions made an order upon the respondents in the name of "the churchwardens and overseers of the parish of F." for payment of the appellant's costs. Held, that the order was rightly made in that form. *Seemle*, that an order made in such a form is enforceable against the parish officers who are such at the time when the order is made.

Application for costs, when it may be made.

An appellant has the whole day of the sessions to make an application for an order for costs on an appeal where the respondent does not appear, and he is not too late if he makes his application on the same day, after the appeal has been called on and struck out because neither party was present (y). *Quere*, whether such an application ought not to be entertained if made at any time during the same sessions although not made on the same day; for the sessions, though continued by adjournment, are the same sessions in law. It is submitted that where the party has a statutory right to costs, such right cannot be forfeited by failure to demand it on the same day; but that, where the costs are in the discretion of the court, and are not asked for on the same day, the delay may furnish good ground for refusing the application, *e.g.*, where justices who took part in the decision are no longer present, or the adversary has left the court.

Of the taxation of costs.

The taxation of costs by the clerk of the peace, as the officer of the court, is a judicial act, and must therefore be adopted by the court which makes the order for costs. The amount must therefore be ascertained during the sitting of the court (z), unless the parties consent to the taxation being made after the close of the sessions (a), or if the court adjourns before the final close of the sessions, or if the original sessions be adjourned at an adjournment of the same sessions (b). By sect. 20

sessions, their course would be to apply for an adjournment. And see *R. v. Justices of Buckinghamshire* (1854), 4 E. & B. 259, n.

(v) *R. v. Justices of Salop* (1854), 4 E. & B. 257.

(x) (1860), 29 L. J. M. C. 205.

(y) *R. v. Justices of West Riding* (1862), 31 L. J. M. C. 271.

(z) *Freeman v. Read* (1860), 30 L. J. M. C. 123.

(a) *Freeman v. Read*, *ubi sup.*; *R. v. Shrewsbury and Hereford Rail. Co.* (1855), 3 W. R. 373. In strictness, probably, it would not be easy to defend this well-established exception on principle; for jurisdiction cannot be given by consent. It is submitted that the exception rests upon the right of the King's Bench Division to stay its hand, and decline to interfere with an irregularity committed by the court below, where such irregularity is merely technical, and to interfere would produce a miscarriage of justice.

(b) *R. v. Justices of Hampshire* (1864), 33 L. J. M. C. 104; *R. v. Mortlock* (1845), 7 Q. B. 459; *R. v. Justices of Ely* (1855), 25 L. J. M. C.

of the Licensing Act, 1902 (2 Ed. 7, c. 28), in every case of appeal against the decision of any licensing justice, the order of the appellate court as to certain costs mentioned in that section may be made either at the sessions when the appeal is heard, or at the next ensuing sessions, and the costs may be taxed out of sessions.

If upon appeal to the quarter sessions a case is stated for the opinion of the King's Bench Division, under the 11th section of 12 & 13 Vict. c. 45, the practice of the King's Bench Division is to give costs as between party and party (c). Order as to costs where case stated.

In all cases where any order shall be made by any court of general or quarter sessions of the peace, it shall be lawful for the Court of King's Bench, or for any judge of that court at chambers either in term or vacation, upon the application of any person entitled to enforce such order, and upon the production of a copy of such order under the hand of the clerk of the peace, or his deputy, and upon proof of refusal or neglect to obey such order, to order and direct such order of the court of general or quarter sessions to be removed into the said Court of King's Bench, and thereupon such order shall be of the same force and effect, and may be enforced in the same manner as a rule made by the said Court of King's Bench, and all the reasonable costs and charges attendant upon such application and removal shall be recoverable in like manner as if the same were part of such order (d). Enforcing orders of sessions.
No *certiorari* is required to remove such order of sessions (e).

This 18th section does not apply to an order of quarter sessions to abate a nuisance (f). Such an order is enforceable by process directed to the sheriff by the sessions. *Semble*, that sect. 18 of Baines's Act only applies to cases in which before that Act the only mode of enforcing the order of sessions was by indictment (f). Where *certiorari* has been taken away, so that the party affected by the order cannot remove it with a view to quash it, yet if the other party applies to remove it, under sect. 18, with a view to enforce it, the party affected is at liberty to object to the order as bad on the face of it, and such objection, if necessary, may be made by way of original application to the court to set aside the order enforcing the order of sessions (h). If the order be for the payment

1, *ante*, p. 476; *Rawnsley v. Hutchinson* (1871), L. R. 6 Q. B. 305. In the original edition of this work the author considered it doubtful where an appeal had been heard at an original sessions, and there was no application for costs, whether an application for costs at an adjournment could be granted, at all events unless the same justices were sitting at both the original sessions and the adjourned, but it is difficult to see on what grounds the author's doubt is founded, as it is submitted no distinction can be drawn between the adjournment of sessions from day to day and the adjournment over an interval of time.

(c) *Earl of Clarendon v. St. James, Westminster* (1855), 20 L. J. M. C. 213.

(d) 12 & 13 Vict. c. 45, s. 18.

(e) *Hawker v. Field* (1850), 20 L. J. M. C. 41.

(f) *R. v. Bateman* (1857), 27 L. J. M. C. 95.

(h) *R. v. Hellier* (1851), 21 L. J. M. C. 3; *R. v. Hyde* (1852), 21 L. J. M. C. 94.

of a certain sum, a *fi. fa.* or a *ca. sa.* may issue at once, unless it be payable out of a specific fund not under the control of the party sought to be charged, as out of the highway rate under 5 & 6 Will. 4, c. 50, s. 95 (*i*).

Order for costs may be enforced by commitment.

Costs given under 12 & 13 Vict. c. 45, s. 5, being recoverable under sect. 27 of 11 & 12 Vict. c. 43, are within the second exception in sect. 4 of the Debtors Act, 1869, and may therefore be enforced by commitment and imprisonment where the party against whom they are given is not bound by recognizance to pay them (*k*).

Disobedience of order indictable.

Before the above statute, such order, when made, was enforceable against the party who disobeyed it after it had been personally served on him by indictment for the misdemeanour, and he was punishable for his contempt by imprisonment and fine (*l*); and it would seem that the above section is cumulative, and would not, therefore, take away this remedy. Such order was never enforceable by attachment at common law. Where the party ordered to pay costs is bound by recognizance to pay them, the course pursued is to estreat the recognizance.

The quarter sessions on allowing an appeal from special sessions under sect. 6 of the Parochial Assessments Act, 1836, have jurisdiction to set aside the order of special sessions as to costs and to give to the unsuccessful party at special sessions the costs incurred by him at such sessions (*ll*).

Forms of bills of costs on appeals are given *post*, in Appendix B.

SECTION 6.

OF THE TERMINATION OF SESSIONS.

By the departure of the justices without adjournment.

All sessions are terminated as of course by the departure of the justices, the constituted authorities by which they are holden; unless they are previously prolonged by adjournment, proclaimed in the presence of at least two justices.

The whole session is considered in law as one day, and accordingly all the proceedings have reference to the first day, and the justices may, during its continuance (*m*), as we have seen (*n*), annul their former order made in the same session; but this is a power to be exercised with delicacy and discretion, for if enforced by a fresh accession of justices, in the spirit of party or other unbecoming manner, an information might be granted against those of them who were concerned in the transaction (*o*). But this proposition must be understood to be without prejudice to the power of the court to

(i) *R. v. Tryddyn* (1852), 21 L. J. M. C. 108.

(k) *R. v. Pratt* (1870), L. R. 5 Q. B. 176.

(l) *R. v. Mortlock* (1845), 14 L. J. M. C. 153.

(ll) *R. v. Justices of Cornwall*, [1903] 2 K. B. 178.

(m) See *ante*. pp. 33, 34. (n) *Ante*, p. 33. (o) 2 Nolan, 536, 546, 4th ed.

adjourn the consideration of matters from one sessions to another, in cases in which that course may be lawfully taken, and to the power of the court, which is universal, to adjourn the sessions themselves to any future day not later than the next quarter sessions. As the power of the court expires at the conclusion of its sitting, no order then made can be reviewed, or placed in any new situation, at any subsequent session (*p*). But by s. 20 of the Licensing Act, 1902 (2 Ed. 7, c. 28), on appeals against the decision of licensing justices the order of the appellate court as to certain costs mentioned in that section may be made either at the sessions when the appeal is heard or at the next ensuing sessions, and the costs may be taxed out of sessions.

But besides these means by which the justices may, purely of their own authority, procrastinate their decisions on all subjects, there are other modes by which any question of legal difficulty *may* be referred by the justices, of their own authority, to the opinion of a superior tribunal; as by reference of the whole case, or a particular point in it (*q*), to the next judges of assize, or by stating the special circumstances of the case, for the consideration of the King's Bench Division, as to its legal effect.

Referring questions to superior tribunal.

Besides these modes, originating with the sessions themselves, for taking the opinion of a higher tribunal, the writ of *certiorari* may, at the instance of either party, in various stages of proceedings in which it is not taken away by statute, withdraw the cognizance of them to the King's Bench Division.

SECTION 7.

OF REFERENCES TO ARBITRATION.

By 12 & 13 Vict. c. 45, s. 12, at any time after notice given of appeal to any court of quarter sessions against any order, rate or other matter (except a summary conviction or an order in bastardy or any proceeding under or by virtue of any of the statutes relating to his Majesty's revenue of excise or customs, stamps, taxes, or post office) for which the remedy is by such appeal, it shall be lawful for the parties by themselves or their attornies, and by order of a judge of his Majesty's King's Bench Division, to submit the matter or matters of such appeal to the award or umpirage of any person or persons; and every award or umpirage duly made under this Act shall be as binding and effectual to all intents as if the same had been a regular judgment of the said court of quarter sessions, and shall and

Reference of appeal after notice and before entry.

(*p*) *Ante*, p. 33.

(*q*) *R. v. Tedford* (1735), Burr. S. C. 57. See the terms of the commission of the peace.

may on the application of either party be enrolled among the records of the said court of sessions.

The court of quarter sessions on appeal may order a reference by consent.

And by 12 & 13 Vict. c. 45, s. 13, it shall be lawful for any court of quarter sessions, before which any appeal (except against a summary conviction or an order in bastardy, or any proceedings under or by virtue of any of the statutes relating to his Majesty's revenue of excise or customs, stamps, taxes, or post office) shall be brought, to order, with consent of the parties or their attorneys, that the matter or matters of such appeal be referred to arbitration to such person or persons, and in such manner and on such terms, as the said court shall think reasonable and proper; and the award of the arbitrator or arbitrators, or umpirage of the umpire, may on motion by either party at the sessions next or next but one after such award or umpirage shall have been finally made and published, or after the decision of the King's Bench Division, on any motion for setting aside the same, be entered as the judgment of the court of quarter sessions in the appeal, and shall be as binding and effectual to all intents as if given by the said court (*qq*).

Order of reference should provide for the costs.

The order of reference under the above section ought to provide for the costs of the reference and award, otherwise the sessions at which the award is entered has no power to order either party to pay such costs. The sessions at which the award is entered have merely a ministerial duty to perform, that is, to receive and enter the award. The sessions ordering the reference should therefore be asked to make the costs abide the event, or be in the discretion of the arbitrator, for the sessions, having by the order of reference parted with the appeal, are *functi officio*, and no subsequent sessions can make any order dealing with the costs (*r*). Therefore, where

(*qq*) In Baines's Act (12 & 13 Vict. c. 45) the words "general or quarter sessions" are used throughout, but in the revised statutes the words "general or" are omitted. By the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (14), the words "court of quarter sessions" are defined as comprising general or quarter sessions.

(*r*) It was suggested by the author in the 1st edition that perhaps the order of sessions referring the appeal might reserve the costs to be dealt with at the sessions at which the award is entered. It is submitted that the legality of such a course would be open to grave doubt, and that parties to an order referring an appeal would be well advised not to try the experiment. One obvious objection to such a course being adopted is that several sessions may intervene before application is made to enter the award, and the court might and probably would be differently constituted. Moreover, in order to arrive at a just conclusion as to costs, it may be necessary to some extent to enter upon a discussion of the merits of the appeal, which would be highly inconvenient in such a case.—*Eds.* *R. v. Justices of Staffordshire* (1857), 7 E. & B. 935, is an authority in support of this view. "Could anything be devised more inconvenient than to sever the decisions on the merits and as to costs, so as necessarily to have the question as to whether there should be costs decided by persons ignorant whether they ought to be granted or not, or else to have all the expense and inconvenience of a new trial?" *Per Coleridge, J.*, in that case.

an appeal was referred to an arbitrator without making any provision for the costs, and the arbitrator made his award and nothing was said about costs, the sessions entering the award had no power to give costs to either party (*s*).

Previous to the Arbitration Act, 1889 (52 & 53 Vict. c. 49), it was held that the arbitrator had no power to deal with the costs of the reference and award (*t*), unless power to do so was conferred by the order of reference. But by the Arbitration Act, 1889, s. 24, "This Act shall apply to every arbitration under any Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorised or recognised by that Act." It is therefore submitted that now an arbitrator has full power, by virtue of the last-mentioned Act, to deal with the costs of the reference and award (*u*). It is also submitted that all the provisions of the Arbitration Act, 1889, apply generally to arbitrations under Baines's Act—*e.g.*, the provisions for setting aside the award or remitting it for further consideration by the arbitrator (*x*).

It is unnecessary for the sessions to make adjournments of the appeal till the making of the award under the above statute, because at any future quarter sessions, being sessions next or next but one after the publication of the award, the justices would be bound to enter the award as their judgment (*y*).

If upon any reference to arbitration under 12 & 13 Vict. c. 45, it shall be made to appear to the King's Bench Division that, either from the death of the arbitrator or arbitrators or umpire, or from any other cause, it has become impossible that an award or umpirage can be made, it shall be lawful for the said court to order the court of quarter sessions of the peace to enter continuances and hear the appeal (*z*).

Continuance
of appeal on
death of
arbitrator.

No recognizance entered into pursuant to any statute or statutes for the prosecution and trial of any appeal shall be deemed to be forfeited by any agreement for the statement of a special case without previously going to the court of quarter sessions, or by any submission to arbitration under the provisions of this Act (*a*).

(*s*) *R. v. Justices of West Riding* (1865), 34 L. J. M. C. 142; *R. v. Justices of Middlesex* (1871), L. R. 6 Q. B. 220.

(*t*) *Ibid.*

(*u*) Mr. Edward Pollock, the learned editor of *Russell on Arbitration*, is of this opinion: see 8th ed. p. 63.

(*x*) This view would seem to be strongly confirmed by the repeal by the Statute Law Revision Act, 1891, of those portions of sects. 12 and 13 of Baines's Act as to setting aside, &c. awards, and of sect. 15, which applied to such arbitrations the provisions of 3 & 4 Will. 4, c. 42.

(*y*) *Per* Blackburn, J., in *R. v. Justices of Middlesex*, *sup.*

(*z*) 12 & 13 Vict. c. 45, s. 14.

(*a*) *Ibid.* s. 16.

SECTION 8.

OF REFERENCE TO THE KING'S BENCH DIVISION, ON A
SPECIAL CASE.

Power and
duty of
sessions in
respect of
granting
special cases.

Baines's Act,
s. 11.

Parties may
by consent
state a special
case, when.

Though, as we have seen, the quarter sessions cannot delegate their judicial authority, they may give judgment on any appeal, *e.g.*, for confirming or quashing the rate, order, conviction, &c., subject to a special statement of the facts for the opinion of the judge of assize, or of the King's Bench Division, as to the law resulting from them; thus leaving the ultimate event to depend on the judgment of that court (*b*). The former practice has fallen into disuse, and the latter is now supplemented by 12 & 13 Vict. c. 45, s. 11; by which statute it is provided, that at any time after notice given of appeal to any court of quarter sessions of the peace against any judgment, order, rate, or other matter (except an order in bastardy, or a proceeding under or by virtue of any of the statutes relating to his Majesty's revenue of excise or customs, stamps, taxes, or post office) for which the remedy is by such appeal, it shall be lawful for the parties by consent, and by order of any judge of one of the superior courts of common law at Westminster, to state the facts of the case in the form of a special case for the opinion of such superior court, and to agree that a judgment in conformity with the decision of such court, and for such costs as such court shall adjudge, may be entered on motion by either party at the sessions next or next but one after such decision shall have been given; and such judgment shall and may be entered accordingly, and shall be of the same effect in all respects as if the same had been given by the court of quarter sessions upon an appeal duly entered and continued.

Under this section the practice is to give costs as between party and party (*c*).

Subject to the question whether the *certiorari* necessary to remove the order, &c. is taken away in the particular instance by statute (*d*), the same sessions which adjudge on the

(*b*) *R. v. Stoke-on-Trent (Inh.)* (1843), 13 L. J. M. C. 41.

(*c*) *Earl of Clarendon v. St. James, Westminster* (1855), 20 L. J. M. C. 213.

(*d*) *R. v. Allen* (1812), 15 East, 333. As to convictions, see *per* Le Blanc, J., *R. v. Allen, sup.*, and other cases, Paley, 7th ed. 350. But as to the effect of s. 40 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), see *ante*, p. 465, note (zz).

Whether the *certiorari* is lost must depend on the wording of each Act, which, as we have seen, must be express to have this effect. In *R. v. Justices of Middlesex* (1826), 8 D. & R. 117, a local Act prevented the removal by *certiorari* of any "rate, proceeding, conviction, matter, or thing." Counsel moved for a *certiorari* to remove into King's Bench a special case which the sessions had granted, but the court said the language of the section was too strong to be got over, being clearly

appeal(*e*) may grant a special case at the request or without consent of the parties (*f*), whenever a reasonable doubt exists in the minds of a majority of the justices on the subject disputed (*e.g.*, the admissibility of a matter of evidence), but should refuse it where they are so satisfied that they think they ought to decide against either party (*g*). They should not grant cases unless they feel serious doubt (*h*).

The plenary jurisdiction of the justices over the civil business of the sessions, places them in the situation of jurors as well as judges, calling on them as jurors to elicit the facts from the evidence, and as judges to apply and declare the law resulting from the facts. On this account, sessions are not compellable to *grant* a special case (*k*); for such a case must always depend on particular facts which it is the exclusive province of sessions to find; so that if they refuse it, the particular state of facts which would be said to prove their determination to be against law, cannot appear to the court above to be so (*l*).

As to the propriety of granting or refusing a special case, Lord Hardwicke has said (*m*), "It has been much wished that a bill of exceptions would lie to the justices at their sessions, because otherwise it may sometimes happen that they may determine in an arbitrary manner, contrary to the resolutions of the courts of law. For if, *when the matter is doubtful*, they will not state the facts specially, though requested to do so, this is very blameable conduct in them, and it is to be wished that it might be avoided." He also added, "It is a thing very much to be censured and discommended, when an inferior jurisdiction endeavours to preclude parties from an opportunity of applying to a superior."

As to propriety of granting a special case.

comprehensive enough to embrace a special case as a "*thing*," and refused the motion. It would seem that there is a clear distinction between cases reserved by the sessions at the hearing of an appeal for the consideration of the high court, and cases stated by the parties by order of a judge under sect. 11 of Baines's Act. The only way in which the former kind of cases can be brought before the high court is by *certiorari*: see *per* Blackburn, J., in *R. v. L. & N. W. Rail. Co.* (1874), 43 L. J. M. C. 57; and therefore if there is a statute taking away the *certiorari* in such a case it may constitute a fatal objection. But this would seem to have no application to cases stated under sect. 11 of Baines's Act.

(*e*) No subsequent (original) session can grant a special case: *R. v. Michaelstone Vedoes* (1813), 2 Nol. 4th ed. 550.

(*f*) *R. v. Justices of Sussex* (1767), 2 Nol. 770, 4th ed.

(*g*) See *R. v. Justices of Kesteven* (1844), 3 Q. B. 820, *per* Patteson, J.; and *R. v. Justices of Middlesex* (1826), 8 D. & R. 117.

(*h*) See *R. v. Burbach* (1813), 1 M. & S. 376, *per* Bayley, J.; and *R. v. Darby Abbey* (1811), 14 East, 285. It was formerly held that justices should not grant a case where it would be useless, the *certiorari* having been taken away (*R. v. Justices of Middlesex, sup.*), but as to the effect of s. 40 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), where the *certiorari* is taken away, see *ante*, p. 465, note (zz).

(*k*) *R. v. Jarvin (Ex parte Inh.)* (1840), 9 D. P. C. 120, Patteson, J.

(*l*) *R. v. Oulton* (1735), Burr. S. C. 64.

(*m*) *R. v. Preston-on-the-Hill* (1736), Burr. S. C. 77.

Jurisdiction
of King's
Bench where
no case stated.

The High Court has not general jurisdiction as a court of error to review the judgments or orders of sessions in subject-matters over which they have jurisdiction (*n*), unless a defect appears on the face of them when removed by *certiorari* (*o*), or unless the sessions had no jurisdiction (*p*), or was improperly constituted by reason of some of the justices who voted on the successful side being interested (*q*); nor can the court above interfere by way of granting a new trial for improper rejection or reception of evidence, upon objection made on the hearing of the appeal, no case being reserved (*r*). And where the sessions have decided that sufficient search had not been made for an agreement in writing to let in secondary evidence of its contents, the court will not, even on a case stated for their opinion, interfere with their decision, unless it sees clearly that the sessions were wrong (*s*). But it will act in aid of the sessions by taking cognizance of a special case sent up from thence for their opinion, and accompanying the order, conviction, &c. appealed against. It is in this way only that it will overrule a judgment of the sessions in an appeal, where it appears requisite to do so (*t*).

The sessions
can only state
a case on
matter of
law.

The only matter which the sessions can send to the King's Bench Division is a question of law (*u*); from whence it follows that conclusions drawn from the assertions of the witnesses at the hearing must be specifically stated in a case as facts found by the sessions. There ought, therefore, to be a positive finding by the sessions of every essential fact (*x*); for merely stating the testimony or documents from which

(*n*) *R. v. Justices of Monmouthshire* (1828), 8 B. & C. 137; nom. *R. v. Uske* (1828), 2 M. & Ry. 172, cited and acted on in *R. v. Justices of Cheshire* (1838), 8 A. & E. 398; see 1 Ventris, 210. As to mandamus to erase an entry in a court of quarter sessions, see *R. v. Justices of West Riding* (1843), 5 Q. B. 1, *ante*, p. 453.

(*o*) See *R. v. Cottingham (Inh.)* (1834), 2 A. & E. 250; *R. v. Read* (1839), 9 A. & E. 619; *R. v. Justices of Leicestershire* (1813), 1 M. & S. at p. 446; *R. v. James* (1814), 2 M. & S. 321; *R. v. Oulton* (1735), Burr. S. C. 64.

(*p*) *R. v. Justices of Cheshire, sup.*

(*q*) *R. v. Cheltenham Paving Commissioners* (1841), 1 Q. B. 476; and see *ante*, pp. 41, 468.

(*r*) See *ante*, p. 484; *R. v. Frieston (Inh.)* (1833), 5 B. & Ad. 597; *R. v. Kesteven (Inh.)* (1844), 3 Q. B. 810, overruling *R. v. Justices of Carnarvon* (1841), 2 Q. B. 325; and *R. v. Justices of West Riding* (1842), 2 Q. B. 331; *R. v. Blanshard* (1849), 13 Q. B. 318.

(*s*) *R. v. Liberty of Saffron Hill* (1852), 22 L. J. M. C. 22; *R. v. Hinckley (Inh.)* (1863), 32 L. J. M. C. 158; *R. v. Rarden* (1834), 2 A. & E. 156.

(*t*) *R. v. L. & N. W. Rail. Co.* (1874), 43 L. J. M. C. 57; *R. v. Allen* (1812), 15 East, 333; *R. v. Justices of Carnarvonshire* (1820), 4 B. & A. 86; *Ex parte Pratt* (1837), 7 A. & E. 423.

(*u*) The court above will hold itself concluded by a fact found by the sessions; as, *e.g.*, that the appellant was occupier of the property in question: *R. v. Hurdiss* (1789), 3 T. R. 497; *R. v. Folkestone* (1789), 3 T. R. 505; that the governor of the workhouse was an annual office: *R. v. Ilminster* (1800), 1 East, 83, &c. &c.

(*x*) *R. v. Rainham* (1793), 5 T. R. 240; *R. v. Bottesford* (1825), 4 B. & C. 84; *R. v. Road* (1830), 1 B. & Ad. 362; *R. v. St. Cuthbert, Welfs* (1834),

those facts were or might have been deduced would leave the court above to draw the inference which the justices below ought to have done (*y*).

The court, it would seem, has gone further in the way of deciding questions of fact raised for its decision by way of special case in pauper settlement cases, than in any other class of case, and it is perhaps safe to submit that settlement cases stand upon a footing of peculiar indulgence in this respect.

The following observations of Coleridge, J., in *R. v. Woolpit* (*z*), are deserving of attention in this connection:—"No doubt this court has in many instances entered into matters of fact brought before it in settlement cases. Most lawyers regret this: I do not defend it, though the object of it has been to do justice. The court, however, has taken upon it jurisdiction as to matters of fact; but as this is never done quite correctly, no one would wish to increase the number of instances" (*a*).

The court will entertain the question whether, all material facts being stated in the case, there was any evidence to justify the finding of the sessions, and will quash the order of sessions if they think that there was no evidence to warrant the finding, though the finding in question may have been mixed of law and fact, or a question of fact rather than a question of law (*b*).

The rule that there must be a positive finding by the sessions of every essential fact is most important to be observed, as the neglect of it will often occasion a case to be sent back to the sessions to be re-stated. A few examples by way of illustration will therefore be given.

5 B. & Ad. 939; *R. v. Martley* (1738), Burr. S. C. 120; *R. v. Luffington* (1743), 1 Wils. 74. Special orders of sessions are considered in the nature of special verdicts *quoad hoc*: *R. v. Martley*, *ubi sup.*; see Comberbach, 285, 286.

(*y*) *R. v. Lyth* (1793), 5 T. R. 327.

It is sufficient if the sessional state, that it appears to them that the pauper was bound: *R. v. East Knoyle* (1740), 2 Bott, p. 448, pl. 511. If the ordinary meaning of a term is displaced by a local acception, the sessions must explain the latter, or effect will be given to the first, even to the quashing their order: *R. v. Thornham* (1827), 6 B. & C. 733, on the meaning of "ewes going"; *R. v. North Bedburn* (1784), Cald. Ca. 452, on that of "Landsale Colliery."

(*z*) (1835), 4 A. & E. 213.

(*a*) In this case Coleridge, J., treated the question as being analogous to the control maintained by the court over findings of fact by juries; but it is submitted that this supposed analogy is not to be relied upon, unless, indeed, the learned judge intended to liken special cases stated by sessions to special verdicts found by juries. But it would not appear from the report that he meant this.—Eds. Coleridge, J., thus stated the situation of the court in this case:—"The only questions are, have the sessions decided on the fact? If so, have they submitted that conclusion of fact to us? or if they did not intend so to submit it, is it *clearly*" (*i. e. necessarily*) "wrong?"

(*b*) *R. v. Ardington* (1834), 1 A. & E. 260; *R. v. Great Wishford* (1835),

Where on an appeal respecting a pauper's settlement, the question depends on an equivocal hiring, or a doubtful service for a year, the fact of hiring or service is to be found by the sessions one way or other, from the evidence, such as it may be; and stating the evidence only without drawing the conclusion will not suffice (*c*). So, whether a master gave a particular consent to his apprentice to serve a third person is a matter of fact which, let it rest on ever so ambiguous testimony, should be found one way or other, and not left doubtful on the face of the case (*d*). For the same reason, in a question of service under a hiring, the sessions should find whether the service was dispensed with, or the contract dissolved (*e*). Again, on a claim of settlement by residence on an estate, the sessions must state the interest which the pauper took, whether he came in by descent or purchase, and if the latter, the price of such purchase (*f*); that so it may appear on the face of the case whether it was such a purchase as would confer a settlement. Frauds, whether affecting the parties merely, or the gaining a settlement in the parish sought to be burdened, are facts which must be considered and adjudicated on by the sessions (*g*); and being facts, must be specifically found and stated accordingly (*h*). For it is not enough to state *evidence*, though clearly leading to the most palpable conclusion of fraud, if the court above is left to draw that conclusion (*i*).

In some cases the evidence itself, *as well as* the fact or conclusion drawn from it, have both been stated, which course appears erroneous, as it tends to the obvious inconvenience in point of practice, that if the court above should differ from the sessions as to their conclusion, they could not regularly

4 A. & E. 216, in which Patteson, J., said:—"The line of demarcation is not plain between cases in which this court is and is not bound by the finding of sessions": *R. v. Edwinstowe* (1828), 8 B. & C. 672, *per* Bayley, J.

(*c*) *R. v. Bray* (1771), Burr. S. C. 686, *per* Lord Mansfield; and see *R. v. Great Wishford* (1835), 4 A. & E. 216; see *post*, p. 490.

(*d*) *R. v. Shebbeare* (1800), 1 East, 73.

(*e*) *R. v. St. Peter, Norwich* (1800), 8 T. R. 477.

(*f*) *R. v. Warblington* (1786), 1 T. R. 241.

(*g*) *R. v. Barmston (Inh.)* (1838), 7 A. & E. 858; *R. v. Tedford* (1735), Burr. S. C. 57, cited by Williams, J., in *R. v. Woolpit* (1835), 4 A. & E. 205.

(*h*) *R. v. Tillingham* (1830), 1 B. & Ad. 180. Whether the fraud so found prevents the settlement from being gained may be a question for the King's Bench: *ibid.*; *R. v. Kibworth* (1828), 7 B. & C. 790; *R. v. Kegworth* (1828), 2 M. & Ry. 28.

(*i*) *R. v. Llanfihangel Abercowin* (1835), 4 N. & M. 355; *per* Buller, J., in *R. v. Fillongley* (1786), 1 T. R. 461. Fraud, when found generally by the sessions, has been held to bind the court above: *R. v. Llanwinio* (1791), 4 T. R. 473. But where the sessions state the facts particularly on which they find fraud, the court above may set aside or ignore such finding where there was no evidence to sustain it: *R. v. Tedford, sup.*; *R. v. St. Nicholas in Harwich* (1740), *id.* 171; *R. v. Kibworth, sup.*

Sessions must find the facts and not state the evidence.

interfere, and thus in appearance an opinion is asked from them which they cannot judicially give (*k*). Although, however, sessions are not to refer to the court the evidence offered in proof of a material fact, and ask their opinion as a jury on it, but are to draw conclusions and form an opinion from the evidence before them, *e.g.*, whether or not there was a contract of hiring or apprenticeship, yet, having so done, they may ask the opinion of the court above, whether the facts stated, and which led them to the judgment they have formed, were sufficient to warrant the conclusion arrived at (*l*). However, where they do both, *viz.*, state facts and draw conclusions from them, the court will not in general disturb the finding, unless the case shows it to have been without, or contrary to, evidence (*m*). In the cases collected in the note at foot, the court quashed the orders of sessions upon the ground that the sessions clearly came to a wrong conclusion upon the facts set out in the case (*n*).

The court above will not consider any question besides that reserved by the sessions (*o*), although some objection, which, if it had been raised by the case, would have been fatal to the order, may be disclosed on the face of the proceedings. Unless the facts disclosed by a *special case* show the decision of sessions to be necessarily wrong, their order will not be disturbed (*p*). The sessions ought not to ask a question, and in case of the answer being one way, to order the appeal to go back to the sessions for rehearing, but must state the case in such a form that the opinion of the court on it will be final, otherwise the case will not be entertained (*q*). Accordingly, the court refused to entertain a case reserved on the making of an order respiting an appeal which was intended

The case must state the decision of the justices.

(*k*) *R. v. Tedford* (1735), Burr. S. C. 57; *R. v. Bowling* (1742), *id.* 177; see, as to Appeals from Orders of Removal, *post*, Chap. V.

(*l*) *R. v. Pilkington (Inh.)* (1844), 13 L. J. M. C. 61; and *R. v. Kingsclere (Inh.)* (1843), 13 L. J. M. C. 22.

(*m*) *Per Coleridge, J.*, in *R. v. Great Wishford* (1835), 4 A. & E. 224; also *R. v. Rickinghall Superior* (1832), 1 N. & M. 47; *R. v. Nether Knutsford* (1831), 1 B. & Ad. 726.

(*n*) *R. v. Ardington* (1834), 1 A. & E. 260; *R. v. Threkingham* (1838), 7 A. & E. 868; *R. v. Clisby* (1832), 1 N. & M. 118; *R. v. Nether Knutsford*, *sup.*

(*o*) *R. v. Hartpury* (1847), 16 L. J. M. C. 105; *R. v. Thomas* (1857), 7 E. & B. 399; *R. v. Dickenson* (1857), 26 L. J. M. C. 204; *R. v. Guildford* (1818), 2 Chit. R. 284; *R. v. Aire Navigation* (1788), 2 T. R. 666.

(*p*) *R. v. Snape* (1837), 6 A. & E. 278; *R. v. Pilkington (Inh.)*, *sup.*

(*q*) *R. v. L. & N. W. Rail. Co.* (1874), 43 L. J. M. C. 57; *R. v. Kesteven* (1844), 13 L. J. M. C. 78; *R. v. Marton-cum-Grafton* (1847), 16 L. J. M. C. 159; *Anon.* (1698), Salk. 486; *R. v. Worth* (1843), 4 Q. B. 132; *R. v. West Houghton (Inh.)* (1843), 13 L. J. M. C. 41. In *R. v. St. John's, Margate (Inh.)* (1841), 1 Q. B. 252, they quashed the order of sessions according to one term in the case, but would not send it back to be reheard as there prayed.

to raise the point whether the sessions ought to have entered and respite^d or not (*r*).

It is the duty of counsel to take care, as far as lies in their power, that all material facts proved, as well as all inferences of fact to be drawn from the evidence, should be found by the justices, and duly noted down by the chairman, and where special cases are signed by counsel their signatures are taken as guaranteeing that this has been done (*s*).

Mode of
stating
special case.

The procuring the statement of a special case after it has been granted is thus carried into effect. In contemplation of law, it is taken to be stated by the justices at sessions (*t*); but as the accuracy requisite makes it desirable that it should be framed by counsel (*u*), it is usually drawn by the junior counsel for the party on whose application it is granted, being afterwards sent to the junior counsel on the other side for his perusal and approbation. Differences between them as to its contents are eventually settled by reference to the chairman's notes. The case is then signed by the junior counsel on each side. If no counsel are employed, or if they cannot agree on the facts to be stated, even with the chairman's assistance, he should, with the concurrence of a majority of justices on the bench, state and sign the case himself (*x*), for under special circumstances they are compellable to state a case where in open court they have consented to do so (*y*), though a mandamus for that purpose was refused where it was clear that the proceeding could lead to no result, *e.g.*, where the chairman, in consequence of his own opinion and that of the other justices on the facts, refused to sign any statement but one which would have excluded the point of law relied on by the party demanding the case (*z*).

If the case stated sets out the reasons for the order of sessions, the court will understand the reasons so set out to be the full reasons, and will accordingly quash the order if it holds those reasons to be ill (*a*).

There is no specific form or precedent according to which a special case must be drawn (*b*); but, nevertheless, there are

(*r*) *R. v. L. & N. W. Rail. Co.* (1874), 43 L. J. M. C. 57.

(*s*) Reporter's note: *R. v. Great Wishford* (1835), 4 A. & E. 216.

(*t*) *Per* J. Parke, J., MSS., cited in 1 D. P. C. 167.

(*u*) *Per* Coleridge, J., in *R. v. Woolpit* (1835), 4 A. & E. 205. In one case an order of removal, and an order of sessions confirming it, were quashed for the imperfect statement of facts in a special case: see *R. v. Luffington* (1744). Burr. S. C. 232; *R. v. Dursley* (1794), 6 T. R. 53.

(*x*) *R. v. Great Wishford*, *sup.*

(*y*) *R. v. Effingham (Earl) and others* (1781), 2 B. & Ad. 393, n.; *R. v. Jarvin (Ex parte Inh.)* (1840), 9 D. P. C. 120; *R. v. Justices of Pembrokeshire* (1831), 2 B. & Ad. 391. Parke, J., is reported as having said that justices were not compellable to settle a case, but *qu. R. v. Justices of Suffolk* (1832), 1 D. P. C. 168.

(*z*) *R. v. Justices of Pembrokeshire*, *sup.*

(*a*) *Per* Lee and Page, JJ., in *R. v. Tedford* (1735), Burr. S. C. 57.

(*b*) A form is, however, given in 4 Burn's J. by Chitty, 29th ed. 1401; and the form in *R. v. St. Paul's, Exeter* (1829), 10 B. & C. 12, is approved.

certain rules to be collected from a long succession of determinations which have been alluded to. The facts should be stated in such a manner as to distinctly raise the questions intended to be considered.

The justices should also state all material facts proved before them. An attempt to select such only of the facts as they conceive to be necessary to raise the question of law intended to be submitted to the court may prove ineffectual, and render the special case abortive; for upon argument of the case facts may turn out to be material which were not originally thought to be so (*c*). The court will not permit a general or speculative question of law to be raised, by omitting any particular circumstances belonging to the case before them which are material to its decision (*d*).

When justices decide that a special case shall be stated, they virtually say that the cause shall be adjourned till that is done (*e*); and, therefore, the want of the necessary adjournment or respite is merely the omission of the clerk, and may be supplied at any time (*f*).

By sect. 40 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), a writ of *certiorari* shall not be required for the removal of any conviction, order or other determination in relation to which a special case is stated by a court of general or quarter sessions for obtaining the judgment or determination of a superior court (*ff*). And now by the Crown Office Rules, 1886, rule 34 provides that no special case stated by a court of general or quarter sessions for obtaining the judgment or determination of the high court upon any order or other determination of a court of general or quarter sessions, shall be filed at the Crown Office Department after the expiration of six calendar months from the making of such order or determination, except by leave of the court on special circumstances being shown, either before or after the expiration of such six months.

By rule 38, no special case stated upon any order or other determination of a court of general or quarter sessions shall be filed at the Crown Office Department, unless the party proceeding upon such special case shall enter into a recognizance as provided by rule 36, and in default thereof the justices may proceed as in that rule provided. (For rule 36, see p. 506, *post*.)

The further practice on the special case coming on for hearing before the court does not fall within the scope of the present work, but see Short & Mellor's Crown Office Practice.

(*c*) See *R. v. Dursley* (1794), 6 T. R. 53.

(*d*) *R. v. Francis Hall* (1777), Cowp. 613.

(*e*) Involved in *R. v. Oundle (Ink.)* (1842), 3 Q. B. 353, n.; see *R. v. Justices of Suffolk* (1832), 1 D. P. C. 168; *R. v. Justices of Pembrokeshire* (1831), 2 B. & Ad. 391.

(*f*) *Per cur.* in *R. v. JJ. of Sussex* (1768), 2 Bott, 6th ed. pl. 1002.

(*ff*) The effect of this section is more fully considered *ante*, at p. 465, note (zz).

Proceedings
to remove the
order and the
case.

Proceedings
where
attempts to
settle a case
are abortive.

Where, however, the original order of removal was *confirmed* by the sessions subject to a case, but the counsel disagreed as to its terms, and the chairman and justice did not settle it when referred to for that purpose, a mandamus issued commanding them to enter continuances and hear the appeal; for they had not decided the appeal, their order of confirmation being conditional, and no order at all if no case was returned (*g*). In the last case, though nearly two years elapsed between the granting the case and the application for a mandamus, the *certiorari* had been sued out within six calendar months, as required by law. But where an order of removal was confirmed at sessions, subject to a special case, which remained unsettled for more than six calendar months after it was granted, and *no certiorari had been sued out in time*, the mandamus to enter continuances and hear the appeal was refused; for the order had become absolute at the end of those months, no *certiorari* having been sued out (*h*). Where justices dismissed an appeal upon a preliminary objection, but at the request of the appellants agreed to state a case, but the appellants, instead of following up the case, deserted it and applied for a mandamus, the Court of King's Bench refused the writ, Lord Denman, C. J., saying that the justices had themselves granted a complete remedy and that the appellants could not come with a high hand and say that they would abandon the remedy so given and apply for a mandamus (*i*). Notwithstanding, however, the great authority of this decision, it is submitted that the applicants pursued a proper course in moving for a mandamus, for the statement of the case, being upon a preliminary point, could not have raised the case for the decisive opinion of the court, and for that reason would not have been entertained by the court had it in fact been stated (*k*). This point was not presented to the court, whose judgment proceeded upon the assumption that the case, if stated, would have afforded complete relief to the applicants.

Proceedings
where special
case abandoned.

Again, where, on appeal against an order of removal, the sessions, without going into the appeal, quashed the order, on the ground that the examination sent to the appellants did not state the pauper to be chargeable at the time of making the order, but afterwards granted a case to the respondents

(*g*) *R. v. Justices of Suffolk* (1832), 1 D. P. C. 163, and MS. case there cited and relied on.

(*h*) *R. v. Justices of Staffordshire* (1857), 7 E. & B. 939, *per* Lord Campbell; 1 Dowl. P. C. 484, approving *R. v. Justices of Suffolk*, *sup.* Notwithstanding the abolition of the *certiorari* in such a case, rule 34 of the Crown Office Rules, 1886 (*ante*, p. 491), preserves the importance of these decisions. It is submitted that under the modern practice it would be a prudent and proper course to apply to the King's Bench Division under rule 34 within the six months for an extension of time for filing the special case.

(*i*) *R. v. Justices of West Riding* (1834), 1 A. & E. 606.

(*k*) See cases referred to, *ante*, p. 489.

on the point of construction of the Act respecting it, but the case was not brought up, the court refused to hear the point discussed on a rule obtained by the respondents for a mandamus to enter continuances and hear the appeal, and discharged the rule. For though the respondents might have forborne to take a case, and might then have applied for a mandamus, they could not have both remedies at once (*l*). So a rule for a like mandamus was refused where the sessions had dismissed an appeal unheard, confirming the order of removal, because the notice of appeal had been served on one only of several parish officers, but had granted a case, at the instance of the appellants, which was not brought up (*m*).

The facts are for the judgment of the sessions. Where it was made a question of fact at a sessions whether there was a hiring and service for a year in the appellant parish, and the sessions confirmed the order of removal, thus virtually holding the affirmative, but granted a case for the opinion of the court whether a settlement was thus gained, which case stated the evidence as to that fact: the court said that the sessions being bound to hear the evidence, the case amounted to a finding by them of a fact, the decision of which belonged to them, viz. that there was a hiring and service for a year in the parish to which the removal had taken place, and held that such finding ought not to be disturbed, if there were any premises to warrant it (*n*).

In the last case, many instances are collected where the court above has interfered by examining and adjudging on matters of fact, if brought before it for their opinion by special cases (*o*), though the sessions had themselves decided on the facts subject to such opinion.

Where the special case is manifestly insufficient as stated, e.g., if it contains evidence only, without finding facts, or omits circumstances material to the decision of the particular case, in order to raise a general question which would not otherwise arise (*p*), or without finding fraud, states facts

(*l*) *R. v. Justices of Suffolk* (1837), 6 A. & E. 109.

(*m*) *R. v. Justices of Northamptonshire* (1837), in *Morborn v. Warmington* (1837), 6 A. & E. 111, n.

(*n*) *R. v. St. Andrew the Great, Cambridge* (1828), 8 B. & C. 664; *R. v. Rosliston* (1828), *id.* 668; *R. v. Edwinstowe* (1835), *id.* 671; *R. v. St. Martin's in Leicester* (1828), *id.* 674; *R. v. Great Wishford* (1835), 4 A. & E. 216; *R. v. Snape* (1837), 6 A. & E. 278.

These cases support the proposition that, although the question raised is a mere question of fact, or mixed of law and fact, the court will reverse the finding of sessions if the court is satisfied from the case as stated that there was no evidence before the sessions to warrant their finding; yet that the court will not do this if there was any evidence to support the finding, that is to say, unless the court is satisfied from the case as stated that the sessions were necessarily wrong.

(*o*) *Per Colridge, J.*, in *R. v. Woolpit*, 4 A. & E. 213; *R. v. Field* (1794), 5 T. R. 587; and *R. v. Snape*, *sup.*

(*p*) *R. v. Francis Hill* (1777), Cowp. at p. 618.

Where case
sent back to
be re-stated.

The sessions
must re-hear
on case being
sent back.

which merely demonstrate that the decision of the sessions proceeded on the ground of fraud (*q*), the court may send it back to the sessions to be re-stated. Upon this taking place, it is the duty of those who contested the original order to give notice to those who support it, not merely of the order of the King's Bench Division sending the case back for re-statement, but also of any proceeding to have the case re-heard at sessions. For where an order had been so quashed, and the case stated and sent back, and the respondents, *without giving notice* of trial, attended the sessions, and in appellant's absence obtained a confirmation of the order, the order so confirmed was quashed in Queen's Bench on *certiorari* (*r*). The sessions must proceed *de novo*, as on a new trial, to *re-hear* the whole case, and can take no cognizance of any evidence previously given (*s*).

(*q*) *R. v. Llanfihangel Abercowin* (1835), 4 N. & M. 355.

(*r*) *R. v. Barnes* (1842), 3 Q. B. 437.

(*s*) *R. v. Bromley* (1795), 6 T. R. 330; *R. v. Bloxham* (1834), 1 A. & E. 386, *per* Patteson, J.: "I do not acknowledge the distinction between re-stating and re-hearing. How is it possible for the sessions to re-state the case without hearing it again? The bench may not consist of the same persons"; *R. v. Page* (1765), 2 Bott, by Const. 5th ed. 764. In this case the question was whether one P. was an occupier of certain tithes or only a bailiff. In the case first stated the evidence on both sides was set out, but there was no determination of the fact, and the court sent the case back to be re-stated, whereupon the sessions, without hearing any evidence, stated that he was an occupier. Thereupon, on motion, the following order was made by the court: "The court then ordered, that the order returned with the *certiorari*, and also the last re-stated order returned hither respecting a rule of this court be sent back to be re-stated, and to state whether, and how, and in what manner, the said P. is an occupier of the tithes, and to hear evidence as to the fact." One justice had voted for hearing evidence when the case was before the sessions the last time to be re-stated; and upon making the last order the court approved highly of his conduct, and resented in very strong terms the behaviour of the other justices, saying, that if anyone would move for an information against them, the court would certainly grant it; that they had no right to take any notice of what had passed before; that it was in the nature of a new trial; and that they ought to have proceeded as if it had been an entire new business.

In *R. v. Hitcham* (1760), Burr. Sett. Cas. 489, a case was sent back to be re-stated, not for any defective statement of the facts, but because cause was shown to the court by *affilavit* going to show that a material fact had been mis-stated in the case merely by mistake.

In *R. v. Bray* (1771), Burr. Sett. Cas. 682, the court distinguished *R. v. Page*, and held that the sessions had done right in not hearing the whole evidence over again. Lord Mansfield said: "Whether the justices at the second sessions were or were not obliged to hear new evidence is a question that must depend upon the nature of the case. In *Page's case* new evidence was necessary. But in the present case it was sent back *only to cure an informality*. Here the pauper had before given a full account of the agreement. Therefore the justices at this second sessions did very right in not examining him over again."

In this case (*R. v. Bray*) three justices were present on the occasion when the case came before the sessions to be re-stated who were not present on the former occasion when the appeal was heard and the case stated. Mr. Dunning argued, unsuccessfully: "The three justices

However, no case will be sent back to be re-stated on a mere formal objection if enough appears upon it to enable the court above to give judgment on the merits of the question submitted to them (*t*); or if the facts stated warrant the judgment, though the court below has drawn an inference which they do not warrant (*u*), or if they rejected evidence improperly, which, if admitted, ought not properly to have led them to any different conclusion (*x*), nor on an affidavit of a witness that the facts are not stated truly (*y*).

It has been held that where a statute gives an appeal to the next sessions, and requires the justices at those sessions to finally determine the matter, in such terms as to deprive the justices at the next sessions of power to adjourn the hearing of the appeal to a future sessions, and they hear the appeal and state a case, such case can only be sent back for the amendment of some formal defect, for otherwise the justices at the sessions to which the case was sent back to be re-stated would have no power to re-state it, because the sessions had gone by at which alone they were entitled to hear it. This was held by Ashurst and Buller, JJ., against the opinion of Lord Mansfield in a poor rate appeal under 17 Geo. 2, c. 38 (*z*).

who had never heard the examination (*i. e.*, of the pauper) ought to have been permitted to hear it; otherwise the opinion of the majority ought not to bind them. *Their opinions and reasons might have altered the opinion of the others.*"

Submitted, this reasoning is of great force, and ought generally to prevail. *Seemle*, the court in *R. v. Bray* thought the facts so clear as to reduce Mr. Dunning's objections to a mere technicality and to justify a departure from principle in that particular case.

It is an obvious corollary to the rule as to the duty of the sessions ordered to re-state a case to re-hear it, that they must hear any fresh evidence that is tendered in support of the contentions of either party, and that they may come to a different conclusion upon the facts.

(*t*) *R. v. Middlezoy* (1787), 2 T. R. 41; see 2 Nolan, 4th ed. 607.

(*u*) *R. v. Riekinghall Superior* (1832), 1 N. & M. 47.

(*x*) *R. v. Nutley* (1772). Burr. S. C. 701.

(*y*) *R. v. Llanwinio* (1792), 2 Bott, by Const. 5th ed. 662; *Thackham v. Findon* (1700), Salk. 489; *R. v. Matlock* (1833), 5 B. & Ad. 883. In this case the case purported to be signed by the chairman, who had, however, on being applied to by the attorney for the party who contended that the facts were improperly stated, written in reply that he had no recollection of having signed the case. Denman, C. J., upon an application to send the case back upon this ground, said: "We cannot enter into such questions. If a case comes before us with the signature and apparent authority of the chairman, we cannot *without very strong grounds* presume that it is not his."

(*z*) *R. v. Coode* (1783), 1 Bott, pl. 294. It is submitted that if such a case should happen again the court would do well to consider whether Lord Mansfield's opinion should not be followed, in preference to that of the other members of the court in *R. v. Coode*, as being better calculated to promote the ends of justice. It is submitted that the opinion of the majority of the court in that case was based upon too narrow a view of the statute under discussion.

Where an order of sessions under consideration of the High Court upon a case stated is found to be bad on the face of it, the High Court will not necessarily send it back to the sessions in order that the defect may be set right by the sessions under their powers of amendment. Therefore, where iron and coal mines were rated, before iron mines were rateable, and the rate was confirmed generally at sessions, the court quashed the order confirming the rate, though the sessions had power to amend the rate (*a*). So where a rate was quashed at sessions, and it appeared in the King's Bench that a large tract of land was not assessed therein, the order of sessions was confirmed (*b*); but where the sessions confirmed a rate, and the court above held certain burgesses to be improperly omitted, the order of sessions was sent back to have the rate amended by inserting them (*c*). Where necessary, special directions are inserted in the rule by which the order is sent down, commanding the sessions to inquire into and state particular facts (*d*). A new case may, if defective, be again remitted to sessions for further inquiry (*e*). Other modes of dealing with an imperfectly-stated case are: quashing either or both orders by consent of counsel on terms (*f*); inserting a fact in the case under a rule obtained by consent to amend the order (*g*); and admitting the fact by counsel during argument (*h*).

A re-hearing on the merits was allowed where the respondents had stood on a point of form at the sessions, and got the order of removal quashed there, the opinion of the court being afterwards adverse to them on the point of form (*i*). In one case, where the respondents had succeeded at sessions upon a technical objection, the Court of King's Bench refused

(*a*) *R. v. Cunningham* (1804), 5 East, 478. The High Court has no power to amend a poor rate in such a case: *R. v. Milton* (1819), 3 B. & A. 120.

(*b*) *R. v. Aberavon* (1804), 5 East, 453. But there is this distinction to be observed between cases in which the sessions have confirmed a bad rate and cases where they have quashed it. In the former case their decision must have proceeded upon the footing that no amendment was called for; in the latter they must be taken to have decided not to exercise the power of amendment vested in them.

(*c*) *R. v. Watson* (1804), 5 East, 480; see *R. v. Topham* (1810), 12 East, 546.

(*d*) *R. v. Clifton-on-Dunsmore* (1772), Burr. S. C. 697; *R. v. Margam* (1787), 1 T. R. 775 (orders of removal); *R. v. Hogg* (1787), Cald. 266 (poor's rate).

(*e*) *R. v. Bray* (1771), Burr. S. C. 682; *R. v. Clifton-on-Dunsmore*, *sup.*

(*f*) 2 Nol. 4th ed. 606; *R. v. Himley* (1737), Burr. S. C. 115.

(*g*) *R. v. Great Chart* (1742), Burr. S. C. 194.

(*h*) See *R. v. Llandverras* (1766), Burr. S. C. 573; *R. v. Warblington* (1786), 1 T. R. 241. The rule for quashing or confirming the orders must state the facts admitted, and that they were admitted by counsel. See form of rule, *R. v. Llandverras*.

(*i*) *R. v. Arlecdon* (1839), 11 A. & E. 87.

to take this course, Lord Mansfield saying that "it did not appear there were any merits, and probably there were none; for if there had really been any the respondents would scarce have caught at a straw, as they had done, but would have relied upon their merits" (*k*).

Mr. Nolan observes, that no case seems ever to have been remitted to sessions to find the fact of fraud, however pregnant such a conclusion might be on the evidence stated (*l*).

The quarter sessions confirmed an order of removal subject to a special case. That case was sent up to the Court of Queen's Bench, on a rule obtained for quashing the order of sessions. That rule was discharged, and the order of sessions confirmed. The party who brought up the order paid the costs; for the court will not discharge the rule without giving judgment on the confirmation of the order (*m*).

Rule as to costs on special case.

When a conviction has been quashed on appeal for *want of form*, subject to the opinion of the court above on the validity of the objection, and it appears to that court that there is no defect in form, the case will sometimes be sent back to sessions to be re-heard on the merits (*n*). Where a conviction was quashed at the sessions on a ground independent of the merits, and was set up again by the court above on *certiorari*, the appellant applied that the rule should not be drawn up in absolute terms, as that would preclude the appellant from going into the merits of the conviction on his appeal, but that the case should be sent down to be heard on the merits. But the court agreed that as the appellant had chosen to stand upon the objection which he took, he had waived entering into the merits, and they made the rule absolute. But the technical objection which had been taken successfully by the appellant at sessions in this case was of a very frivolous and vexatious character; and it is submitted that the court proceeded rather on the special facts of the case than as laying down any general rule (*o*).

Where the King's Bench Division in exercise of its original common law jurisdiction affirms or quashes an order of sessions on a case stated, an appeal lies to the Court of Appeal although no leave to appeal be given (*p*), and the same rule applies where the special case is stated pursuant to the Highway Act, 1835 (5 & 6 Will. 4, c. 50), ss. 107 and 108 (*q*), and

(*k*) *R. v. Honiton* (1771), Burr. S. C. 680.

(*l*) 2 Nol. 4th ed. 561, 564.

(*m*) *R. v. Latchford (Inh.)* (1844), 14 L. J. M. C. 20.

(*n*) *R. v. Ridgway (Inh.)* (1822), 5 B. & A. 527.

(*o*) *R. v. Allen* (1812), 15 East, 333.

(*p*) *R. v. Savin* (1880), 6 Q. B. D. 309.

(*q*) *Illingworth v. Bulmer East Highway Board* (1884), 53 L. J. M. C. 60.

upon a case stated under 12 & 13 Vict. c. 45, s. 11, by quarter sessions, for such a case is not an appeal under sect. 45 of the Judicature Act, 1873, but an order within sect. 19 of that Act (*r*).

SECTION 9.

OF CERTIORARI TO REMOVE ORDERS OF SESSIONS.

We have before referred to the mode of removing indictments from quarter sessions into the King's Bench by writ of *certiorari*. We will now treat of the *certiorari* as it relates to matters before sessions, such as their orders, &c.

The writ goes to bring before the court orders of quarter sessions or of justices out of sessions, either to rectify them or quash them; and it is no answer to the application for *certiorari* to say that the order sought to be quashed is a nullity on the face of it as being *coram non judice*, for the court will not permit such an order to exist (*s*). Since the 12 & 13 Vict. c. 45, however, the frequency of the writ is much diminished.

What orders,
&c. may be
removed.

Articles of the peace may be brought up from quarter sessions and the order to find sureties therewith, and the court will examine into the sufficiency of the articles to warrant the order (*t*). A poor rate cannot be removed by *certiorari* on account of the inconvenience that would ensue to the poor by the delay, but all the orders of justices relating to it may (*u*). An order of quarter sessions that no officer of the court should take any fee from defendants is a judicial order properly removable by *certiorari* (*x*); and so, also, an order allowing or disallowing items in the treasurer's accounts (*y*); or an order that barristers should have pre-audience in court (*z*).

Any order made by a court of quarter sessions deciding an appeal, composed in part of persons interested in the matter *sub judice*, is removable by *certiorari* (*a*). A *certiorari* to

(*r*) *Holborn Union v. Chertsey Union* (1885), 15 Q. B. D. 76.

(*s*) *R. v. Berkley* (1754), 1 Ken. 81, 99; 1 Burn's J. tit. "Certiorari," 30th ed. 616; *R. v. Justices of West Riding* (1837), 7 A. & E. 583.

(*t*) *Re Dunn* (1840), 4 P. & D. 415.

(*u*) *R. v. Uttoxeter* (1718), 1 Bott, 321; *R. v. King* (1788), 2 T. R. 235; *vide* 2 Str. 932, 975.

(*x*) *R. v. Coles* (1845), 15 L. J. M. C. 10.

(*y*) See *R. v. Saunders* (1854), 24 L. J. M. C. 45.

(*z*) *R. v. Justices of Denbighshire* (1846), 2 New Sess. C. 422; *nom. Ex parte Evans* (1846), 15 L. J. Q. B. 335.

(*a*) *R. v. Cheltenham Commissioners* (1841), 10 L. J. M. C. 99; *R. v.*

remove an order of entry and respite, founded upon affidavits of the facts, is the best mode of obtaining the decision of the court on the question as to the right of the quarter sessions to enter and respite an appeal; as, for instance, where notice of appeal had not been given when required by statute, and the sessions had nevertheless entered and respited the appeal (*b*). And the court will take no notice of the facts, if stated in the form of a special case reserved at the time of making such order of entry and respite, to raise the question whether the order was properly made or not (*c*).

The objection that the instrument removed is not of a judicial nature may be taken on showing cause against the writ to quash it (*d*). Where order not of judicial nature.

Though the attorney-general cannot himself issue a *certiorari*, yet it is granted as a matter of course on his application *ex officio* (*e*). For he represents the crown, which has an absolute right to it in all cases, unless where the statute taking away the *certiorari* expressly mentions the crown (*f*).

At the instance of any private prosecutor the writ is grantable at the discretion of the court (*g*) upon affidavits showing sufficient ground, generally as a matter of course, but not as of right, without the limit as to time and formerly without any recognizance (*h*), but now rule 36 of the Crown Office Rules, 1886 (*post*, p. 506), makes it obligatory on all persons other than the attorney-general acting for the crown. A defendant must show the court sufficient ground for the writ (*i*).

And where prosecutor has become nominally a defendant, as where a conviction is quashed at sessions with costs to be paid by the prosecutor, and he seeks to remove and quash the order of sessions in the court above, he is entitled to a *certiorari*, though the crown has no actual interest (*k*). Again, if the crown thinks fit to take up the defence of a party, the attorney-general's signature will command a *cer-*

Recorder of Cambridge (1857), 27 L. J. M. C. 160; *Re Hopkins* (1858), E. B. & E. 100; *R. v. Allen* (1864), 33 L. J. M. C. 98. See, as to this objection, *ante*, pp. 41, 468.

(*b*) *R. v. Justices of Lancashire* (1857), 27 L. J. M. C. 161.

(*c*) *R. v. L. & N. W. Rail. Co.* (1874), 43 L. J. M. C. 57.

(*d*) *R. v. Hatfield Peverel (Inh.)* (1849), 18 L. J. M. C. 225; *R. v. Overseers of Salford* (1852), 21 L. J. M. C. 223.

(*e*) *R. v. Thomas* (1815), 4 M. & S. 442.

(*f*) See 2 Chit. R. 136; *R. v. Cumberland* (1795), 6 T. R. 194; *R. v. Davies* (1794), 5 *id.* 626; *R. v. Allen* (1812), 15 East, 333.

(*g*) *R. v. Justices of Surrey* (1870), L. R. 5 Q. B. 466.

(*h*) *R. v. Battams* (1801), 1 East, 298; *R. v. Spencer* (1839), 9 A. & E. 484.

(*i*) *R. v. Eaton* (1787), 2 T. R. 89; *R. v. Clace* (1769), 4 Burr. 2458.

(*k*) *R. v. Boulton* (1836), 4 A. & E. 498.

tiorari without special ground laid (*l*), or being restricted by any statute as to the *time* of making the application (*m*).

This writ being beneficial for the subject cannot be taken away, except by express words (*n*); nor will expressions of minor stringency, or indirect application avail (*e.g.*, that the sessions, only on appeal, shall “hear and *finally* determine” (*o*)), if they only lead to an inference, however plain, that the *certiorari* was designed to be taken away (*p*).

We have seen that the writ of *certiorari* cannot be taken away by implication (*q*); nor is a general reference in a later Act to offences created by a former Act, in which the *certiorari* is taken away, sufficient to take it away in offences under the later Act, unless the prohibitory clause is either repeated specially or is to be understood by necessary intendment (*r*). But where the later of several Acts incorporated “all the *provisions*” of two previous Acts (except certain portions of them which its own enactments expressly altered), a clause in one of the former Acts by which the *certiorari* was taken away was held to be a “*provision*” of such Act, and now embodied in the new Act (*s*), and the *certiorari* was lost to parties convicted under the new Act.

(*l*) 1 East, 303, n.; 4 Burr. 2458; *R. v. Stannard* (1791), 4 T. R. 161.

(*m*) *R. v. Battams* (1801), 1 East, 298.

(*n*) *R. v. Chantrell* (1875), L. R. 10 Q. B. 587; but see now 42 & 43 Vict. c. 49, s. 40.

(*o*) *R. v. Jukes* (1800), 8 T. R. 542; *R. v. Morley* (1760), 2 Burr. 1041.

(*p*) The practice of taking away *certiorari* by statute did not seem to prevail till the beginning of the reign of William III. after appeals to the sessions had come into general use, which began about the end of Charles the Second's reign: Paley on Conv. 7th ed. 349. Lord Kenyon used to lament the frequency of Acts taking away the *certiorari*: see *R. v. Jukes*, *sup.*

(*q*) *R. v. Jukes*, *sup.*; *R. v. Hube* (1794), 5 T. R. 542; *R. v. Morley*, *sup.*; *Hartley v. Hooker* (1777), Cowp. 523; cases collected in *R. v. Justices of Ripon* (1837), 7 A. & E. 417. Where counts on an Act creating a misdemeanour were joined with counts at common law for conspiracy to obtain goods by false pretences, it was held that the *certiorari* remained, notwithstanding a clause in the Act which took it away as to proceedings under it: *R. v. Saunders* (1825), 5 D. & R. 611 (on 30 Geo. 2, c. 42, now repealed); and see *R. v. Fowler* (1834), 1 A. & E. 836.

(*r*) *R. v. Terrett* (1788), 2 T. R. 734 (on old Vagrant Act, 17 Geo. 2, c. 5, s. 5). Note, the present Vagrant Act, 5 Geo. 4, c. 83, has no clause taking away the *certiorari*: *R. v. Hester* (1836), 4 D. P. C. 589; *R. v. Kaye* (1822), 1 D. & R. 436; see Paley, 7th ed. 348 *et seq.*

(*s*) *R. v. Fell* (1830), 1 B. & Ad. 380 (on the Acts respecting employ of children in factories); *R. v. Liverpool (Mayor)* (1823), 3 D. & R. 275.

Though the *certiorari* be taken away by statute, an order bad on the ground that it is made without jurisdiction is still removable, the want of jurisdiction being shown by affidavit (*z*).

Where *certiorari* is taken away, order removable, when.

So, if a justice or justices, in or out of quarter sessions, assume to act under a statute, but have no jurisdiction, their order, &c. may be removed by *certiorari*, in order to be quashed, notwithstanding a clause taking away the *certiorari* as to proceedings "had or taken in pursuance of the Act;" for that expression is confined to cases where the inferior tribunal had jurisdiction to make the order complained of (*u*).

The writ is a discretionary writ; but the court, in exercising its discretion as to granting or not a *certiorari*, will grant it to a person aggrieved *ex debito justitiæ*; but to a stranger, who merely comes to inform the court, according to its pure discretion (*x*). But even where the party aggrieved applies, he may have acted so as to preclude himself from obtaining the writ (*y*). Sometimes it will require an affidavit of merits, as in *R. v. Davis* (*z*), where the proceedings were perfectly in form according to the statute and regular on the face of them. Where the application for the writ is made by the defendant he is bound by the limit as to time fixed by rule 33 of the Crown Office Rules, 1886, *post*, p. 502.

How discretion of court exercised.

A rule of court exists in the King's Bench Division against granting a *certiorari* to remove orders of justices from which appeals lie by either party to the sessions before the matter be determined on such appeals, whether pending or not (*b*), for it would hinder that privilege; but if the time for appealing be expired, and no appeal is pending, the objection no longer exists (*c*). And this rule only abridges the authority of the court in cases where the right of appeal is limited to a particular time, as, *e.g.*, to the next quarter session; so that

Where appeal to the sessions lies.

(*t*) *R. v. Bolton* (1823), 1 Q. B. 66; *R. v. Justices of Warwickshire* (1856), 25 L. J. M. C. 119; *R. v. Justices of St. Albans* (1853), 22 L. J. M. C. 142; *R. v. Wood* (1855), 24 L. J. M. C. 130; *Ex parte Henu* (1856), 6 Ir. C. L. R. 239; *R. v. Hyde* (1852), 21 L. J. M. C. 94; *R. v. Justices of Gloucestershire* (1846), 15 L. J. M. C. 48; *Ex parte Bradlaugh* (1878), 3 Q. B. D. 509.

(*u*) *R. v. Justices of Somersetshire* (1825), 6 D. & R. 469.

(*x*) *R. v. Justices of Surrey* (1870), L. R. 5 Q. B. 466.

(*y*) *R. v. South Holland Drainage Commissioners* (1838), 8 A. & E. 429; *R. v. Justices of Yorkshire (E. R.)* (1834), 3 N. & M. 93; and *R. v. Newborough* (1869), 38 L. J. M. C. 129; *R. v. Sheward* (1880), 9 Q. B. D. 711.

(*z*) (1853), 22 L. J. M. C. 143.

(*b*) *R. v. Brooke* (1788), 2 T. R. 196, n.

(*c*) Reg. Gen. Pasch. 1 An. 1; Salk. 147.

where there is no restriction as to time, the rule does not apply, for otherwise the order might never be removed (*d*). And, further, this rule does not apply where the party against whom the order is made seeks to remove it, for it was made in his favour, in order that he might not lose his privilege of appeal, which he is competent to waive (*e*). However, were there no objection to the *certiorari* issuing before the time of appealing is expired, the court will, in its discretion, refuse to grant it, if, on the affidavits in support of the application, the ground alleged for it appears more properly the subject of appeal (*f*).

It has also been determined that where, by the words of any statute, the *certiorari* is taken away, but by its general tenor that was only done to give the option of appeal to the sessions, the right of proceeding by *certiorari* is only barred by the party adopting the method of appeal (*g*).

And if one party has the exclusive right of appealing, he may waive his privilege, and at once remove the proceedings (*h*).

A *certiorari* does not lie where an appeal is given, and the objection is not to the jurisdiction, but to the merits (*i*); or to remove any but judicial acts (*k*); for even though the justices should exceed their authority, and be punishable for so doing, the remedy is not by means of this writ (*l*). And if such a writ issue incautiously or improvidently, the King's Bench Division will supersede it (*m*).

Every application for a writ of *certiorari*, at the instance of any person other than the Attorney-General on behalf of the crown, shall during the sittings be made to a divisional court by motion for an order *nisi* to show cause, and in the vacation, or when there is no sitting of a divisional court, to a judge at chambers to show cause. Provided that where, from special circumstances, the court or a judge may be of opinion that the writ should issue forthwith, the order may be made absolute, or an order be made in the first instance, either *ex parte* or otherwise, as the court or judge may direct (*n*).

Writ, how
obtained in
term time;
in vacation.

(*d*) Cald. 172; Andr. 343; Stra. 991.

(*e*) *R. v. Willatts* (1845), 14 L. J. M. C. 157; and see *R. v. Allen* (1864), 33 L. J. M. C. 987.

(*f*) *R. v. Whitbread* (1780), Doug. 548, *per* Lord Mansfield.

(*g*) *R. v. Eaton* (1787), 2 T. R. 89. This result is expressly provided against by the Gaming Act, 12 Geo. 2, c. 28, s. 6.

(*h*) *R. v. Harman* (1738), Andr. 343.

(*i*) *R. v. Justices of Middlesex* (1839), 9 A. & E. 540.

(*k*) *E. g.*, order of removal as well as of sessions.

(*l*) *R. v. Lediard* (1751), Say. 6.

(*m*) *R. v. Wakefield* (1758), 1 Burr. R. 485.

(*n*) C. O. R. 1886, r. 28.

All recognizances necessary to be entered into must be certified into the King's Bench Division with the writ of *certiorari* or order of removal (*o*). No writ of *certiorari* shall be granted, issued or allowed to remove any judgment, order or conviction, or other proceeding had or made by or before any justice or justices of the peace of any county, city, borough, town corporate or liberty, or the respective general or quarter sessions thereof, unless such writ of *certiorari* be applied for within six calendar months next after such judgment, order, conviction or other proceeding shall be so had or made, and unless it be proved by affidavit that the party suing forth the same has given six days' notice thereof in writing to the justice or justices, or to two of them if more than one, by and before whom such judgment, order, conviction or other proceedings shall be so had or made, in order that such justice or justices, or the parties therein concerned, may show cause, if he or they shall so think fit, against the granting, issuing or allowing such writ of *certiorari* (*p*).

Removal of summary convictions, orders, &c. of justices by *certiorari*.
Limitation of time.

And further, as to the limitation of the time for moving for a *certiorari*,—where an Act directed justices to make an order for stopping a highway, and that it should be subsequently confirmed by an order of sessions, the period of six calendar months “next after such order” within which time the *certiorari* had to be applied for under 13 Geo. 2, c. 18, was calculated from the date of the *latter* order (*r*); but the six calendar months run from the date of the conviction or order, unless there has been an appeal, when the time runs from the making of the order on the appeal (*s*). If an application made within the six months be dismissed as being made on insufficient materials, a fresh motion cannot be made after the six months and attached to the former proceedings so as to make it within time (*t*). And if a summons be taken out at chambers in due time, and the judge make no order, and dismiss the summons, an application to the court after the six months has expired cannot be referred back to the summons at chambers (*u*); but if a sub-

(*o*) C. O. R. 1886, r. 32.

(*p*) C. O. R. 1886, r. 33.

(*r*) *R. v. Justices of Middlesex* (1836), 5 A. & E. 626.

A sessions began on 5th April, and made an order on an appeal against an order of removal on the 7th. On 4th October an application was made at a judge's chambers for a *certiorari* to remove the order of removal, and the writ was granted on or before 8th October. Held in time: *R. v. Abergeldie (Inh.)* (1836), 5 A. & E. 796, n.

(*s*) *R. v. Morice* (1845), 1 New Sess. C. 585.

(*t*) *R. v. Cartworth (Inh.)* (1844), 1 D. & L. 837.

(*u*) *Ex parte Llanbeblig (Inh.)* (1846), 15 L. J. M. C. 92; *R. v. Justices of Anglesea* (1846), 10 Jur. 816.

stantial and real application is made on the last day of the six months, the applicant is not to suffer because the only judge before whom the matter could be heard does not happen to be in attendance on the particular day; thus, in the vacation, it is enough if he comes and makes known to the clerk in attendance at chambers the nature and object of his application, and places the materials in his hands (*x*).

Notice to justices of motion for *certiorari*.

The object of requiring notice to the justices is to enable them to show cause in the first instance against a motion for issuing a *certiorari* (*y*). Such notice must be served six days before the day on which the rule for a *certiorari* is applied for (*z*), such days are to be reckoned exclusively of the first day and inclusively of the last day (*a*). The six days' notice required by rule 33, C. O. R. 1886, as a preliminary to the grant of a writ of *certiorari*, must precede the motion for a rule *nisi* and not merely the motion for the rule absolute (*b*).

The notice should state that it is given by the party intending to sue for the *certiorari*, and should specify who he is (*e*), naming him (*f*). The *certiorari* can only be issued at the instance of the party giving the notice; for if he avowedly drops the proceeding, it cannot issue at the instance of any other, though it may be too late to give any fresh notice to the justices (*g*). If the application for the *certiorari* is intended to be made on behalf of parish officers, the notice must be signed by all or at least a majority of them, and if signed by one only, and shown to the court to be unauthorised by the rest, and not signed on their behalf, it is insufficient (*h*). It seems it may be signed by a party who describes himself

(*x*) *R. v. Allen* (1864), 33 L. J. M. C. 98; *R. v. St. Mary, Whitechapel* (1843), 2 Dowl. N. S. 964; *R. v. Abergele (Inh.)* (1836), 5 A. & E. 795.

(*y*) *R. v. How* (1839), 11 A. & E. 159.

(*z*) Where the notice stated an intention to move for a *certiorari* "on the first day of next term, or so soon after as I can be heard," and was served on the first day of the term, the rule for the *certiorari* was discharged, though the motion was not made till after the expiring of six days from the day of service: *In re Flounders* (1833), 4 B. & Ad. 865, Lord Denman *dubitante*; see *R. v. Rose* (1845), 15 L. J. M. C. 6.

(*a*) C. O. R. 294; *R. v. Goodenough* (1835), 2 A. & E. 463.

(*b*) *Ex parte Roberts* (1886), 50 J. P. 567.

(*c*) *R. v. How* (1839), *sup*.

(*f*) *R. v. Justices of Lancashire* (1821), 4 B. & A. 289; see form, *post*, p. 512.

(*g*) *R. v. Justices of Kent* (1832), 3 B. & Ad. 250. The six months after the making the order had elapsed.

(*h*) *R. v. Justices of Cambridgeshire* (1832), 3 B. & Ad. 887, as explained in *R. v. Justices of Lancashire* (1839), 11 A. & E. 144.

as solicitor or attorney for the parties applying for the *certiorari* (i).

If the notice only alleges that the justices served were "two of the justices *present at the sessions* at which the appeal mentioned in the notice came on for hearing," the *certiorari* obtained on it will be quashed (j), even though the proceedings before the quarter sessions have been brought up and the matter set down for argument (k). In a case at a borough session under 45 & 46 Vict. c. 50, s. 165, notice must be given to the recorder only, he being sole judge. When the order of sessions is on appeal against a conviction, notice should be given both to the convicting justices and to the justices present at sessions (l).

Nor can this omission be supplied by issuing a fresh writ on sufficient affidavits, or by exhibiting them on showing cause, if more than six calendar months have elapsed since making the order (m).

The notice may be served either personally or by leaving it at the last known place of abode, with a clerk, wife, or servant (n).

The *affidavit of service* (see Form, pp. 513, 514) of the notice should state that the two justices named and served were two of the justices *by and before* whom the appeal was heard and the proceedings had, and who made the order of sessions (o);

(i) *R. v. Justices of Lancashire* (1839), 11 A. & E. 144; *R. v. Abergele* (1836), 5 A. & E. 795.

A notice more full in this particular, viz., notice of application for a *certiorari* to remove an order of justices relating to the gaols of M. signed by "A. and B. solicitors for W. G., a ratepayer of M." was held good; for the signature of W. G. was not required by the Act, nor did the justices show that the notice so given was not authorised by W. G.: *R. v. Justices of Lancashire* (1839), *sup.* A notice signed by A. B., "attorney for the present churchwardens and overseers of M. O.," was held sufficient: *R. v. Solly* (1840), 9 D. P. C. 115. Again, in *R. v. Abergele (Inh.)* (1836), 5 A. & E. 795, the notice was signed by the "attorney for the respondents," and no other account of it was given in the affidavit; but it was held sufficient, and the *certiorari* was granted. This signature, "J. B. attorney for respondents," will suffice, if appellants' and respondents' names are stated, and notice is given to every justice present at the hearing: *R. v. Justices of Wilts* (1841), 9 D. P. C. 524; *R. v. Justices of Suffolk* (1852), 21 L. J. M. C. 169.

(j) *R. v. Justices of Yorkshire (West Riding)* (1844), 14 L. J. M. C. 41.

(k) *R. v. Cartworth (Inh.)* (1843), 13 L. J. M. C. 26.

(l) *R. v. Babbage*, Trin. 1838.

(m) *R. v. Gilberdike (Inh.)* (1843), 5 Q. B. 207; *nom. Gilbertsome*, 13 L. J. M. C. 46; *Anon.* (1843), *id.* 28.

(n) C. O. R., 1886, r. 139.

(o) *R. v. St. James, Colchester* (1851), 20 L. J. M. C. 203; *R. v. Justices of Cornwall* (1844), 1 New Sess. C. 414; *R. v. Cartworth (Inh.)*, *sup.* It

and though an interested justice ought not to take part in the proceedings on the making of the order, yet if he do interfere, a notice of the application may be rightly served upon him (*p*); but it should not be served upon a magistrate who took no part in the proceedings, and avowedly abstained (*q*). If it appears on the motion that such notice has not been given, a rule even to show cause why a *certiorari* should not issue will be refused (*r*); and it is not too late to object to the notice, after a rule for *certiorari* granted and enlarged by consent (*s*).

Entering into
recogni-
zances.

By rule 36 of the C. O. R. 1886, no writ of *certiorari* shall be allowed to remove any judgment, order, or conviction given or made by justices, unless the party (other than the attorney-general acting on behalf of the crown) prosecuting such *certiorari*, before the allowance thereof, shall enter into a recognizance with sufficient sureties before one or more justices of the county or place or at their general or quarter sessions, where such judgment or order shall have been given or made, or before any judge of the High Court, in the sum of 50*l.*, with condition to prosecute the same at his own costs and charges with effect, without any wilful or affected delay, and to pay the party in whose favour or for whose benefit such judgment, order, or conviction shall be confirmed, his full costs and charges, to be taxed according to the course of the court where such judgment, order, or conviction shall be confirmed; and in case the party prosecuting such *certiorari* shall not enter into such recognizance, or shall not perform the conditions aforesaid, it shall be lawful for the said justices to proceed and make such further order for the benefit of the party for whom such judgment shall be given, in such manner as if no *certiorari* had been granted.

As to filing this recognizance in crown office, see C. O. R. 1886, r. 123.

The statute, 5 Geo. 2, c. 19, s. 2, on which rule 36 is based, did not apply to prosecutors in a criminal proceeding, but the present rule is wider in its application, and now prosecutors

has been held that an affidavit of service of notice of *certiorari* under 13 Geo. 2, c. 18, s. 5, on A. and B. "two of the justices present at the sessions at which the order was made, and who are two of the same justices whose names are mentioned in the heading or caption of the said order," was, under the circumstances, sufficient as against the appellant parish: *R. v. Sevenoaks (Inh.)* (1845), 14 L. J. M. C. 92.

(*p*) *R. v. Justices of Suffolk* (1852), 21 L. J. M. C. 169.

(*q*) *R. v. Justices of Herefordshire* (1844), 14 L. J. M. C. 41, n.

(*r*) *R. v. Justices of Sussex* (1813), 1 M. & S. 631, 734; *In re Flounders* (1833), 4 B. & Ad. 865; *R. v. Justices of Glamorganshire* (1793), 5 T. R. 279.

(*s*) *R. v. How* (1839), 11 A. & E. 159.

must enter into the recognizance in the manner laid down by the rule.

The allowance is by the persons to whom the writ is directed (*x*), and the party issuing out the writ has no right to call upon the justices to allow and return it until he has entered into a proper recognizance as the rule requires; and if an allowance is made before proper recognizances are entered into, the court will quash the allowance, but will not quash the writ or take further notice of it till it has been properly allowed and returned (*y*); and if he does not enter into proper recognizances, and no allowance is therefore made, the court will grant a *procedendo* unless he engage to enter into the recognizances (*z*). If a *certiorari* has been applied for in time, but the allowance of it is quashed for a defect in the recognizance, and the time has passed for applying for the writ, the court may enlarge the time for the return, and send the writ down again to be properly allowed by the sessions (*a*). The recognizance entered into must be a single one for an entire sum of 50*l.*, and if a defendant and his sureties enter into recognizance for two sums of 25*l.* each, it is bad (*b*). But where a parish prosecutes a *certiorari* in order to remove an order of sessions, it is sufficient if the recognizance formerly required by 5 Geo. 2, c. 19, s. 2—now by r. 36, C. O. R. 1886—is entered into by *any* inhabitant on behalf of the rest of the parish, with two inhabitants sureties in a joint sum of 50*l.* (*c*). The discharge of the rule for quashing the order of sessions does in effect confirm the order within the meaning of the statute 5 Geo. 2, c. 19, s. 2, and the consequences of that section thereupon attach (*d*). Allowance of the writ.

If there be any variance between the description in the *certiorari* of the matters sought to be removed, and the record, the justices are not obliged to return such record (*e*): *e.g.*, if it be directed to the justices of a county, where in fact they are only the justices of a division, or liberty, or other portion of a county, or of a city or borough within that county; or if The return.

(*x*) *R. v. Abergele (Inh.)* (1836), *per* Patteson, J., 5 A. & E. 795.

(*y*) *R. v. Dunn* (1799), 8 T. R. 217; *R. v. Jones* (1841), 9 Dowl. P. C. 504.

(*z*) *R. v. Baker* (1859), 28 L. J. Q. B. 377.

(*a*) *R. v. Abergele (Inh.)* (1836), 5 A. & E. 795.

(*b*) *R. v. Dunn* (1799), 8 T. R. 217; and see 5 A. & E. 798.

(*c*) *R. v. Abergele (Inh.)*, *ubi sup.*

(*d*) *R. v. Latchford (Inh.)* (1844), 14 L. J. M. C. 20.

(*e*) *R. v. Heddingham Sible (Inh.)* (1737), Burr. S. C. 112. But when a case comes on to be argued in King's Bench, it is too late to object that the order or document brought up in return to the *certiorari* differs from that required by that writ, the proper course being to have moved before argument to quash the return: *R. v. Fordham (Inh.)* (1839), 11 A. & E. 73.

any other materially erroneous description of person, or place, or previous proceeding occur in it (*f*). Some things, however, are considered immaterial, and, in these, trifling errors will not vitiate, *e.g.*, in the mis-spelling of a surname, or in giving the name of a person without *any* addition (*g*). But a wrong christian name, or a gross error in the number of the defendants, or in the addition of rank or title, have in certain old cases been held fatal (*h*). If, however, the justices obey the writ and return the conviction, they cannot afterwards object to the variance in the description in the writ (*i*).

When the writ mentions only orders against A. B. and C. or indictments wherein A. B. and C. are indicted, it will not remove an order against A. alone or A. and B. only. But a *certiorari* for the removal of all indictments against A. will remove all indictments in which A. is indicted jointly with others (*j*); and it is presumed that this applies not only to indictments, but to all proceedings removable by the writ.

Should no return be made, an order of course may be obtained at the crown office (*k*) to return the writ within four days after service of the order if served in London or Middlesex, or within eight days in other cases (*l*). On disobedience of the order, the parties against whom the writ is directed will be in contempt, and an attachment may be moved for against them; but the writ must be delivered before the time for its return has expired (*m*).

The record itself must be returned, and *that* without any extraneous matter or explanation (*n*).

The return is made by endorsing the writ according to the form, p. 514, and annexing the schedules.

Return,
who by.

The writ, if directed to the sessions, is usually returned by the chairman of the day; if to individual magistrates, by those to whom it is directed. The return should be under the seal of an inferior court, if to any such directed; but if to any court not having a common seal, under the seal of the person making the return (*o*).

Certifying a
recognizance.

A recognizance taken by a justice of peace ought to be certified by such justice *only*, till it be made a record of

(*f*) *R. v. Turk* (1847), 10 Q. B. 540.

(*g*) *Hawk. P. C. b. 2, c. 27, s. 81 et seq.*; *Cro. El.* 172.

(*h*) *Ibid.*

(*i*) *R. v. Turk, ubi sup.*

(*j*) *R. v. Baines* (1705), 2 Ld. Raymond, 1199; 2 *Hawk. P. C. C.* 27, s. 80.

(*k*) *C. O. R.* 1886, r. 252.

(*l*) *C. O. R.* 1886, r. 233.

(*m*) *R. v. Rhodes* (1665). *Keb.* 944.

(*n*) *R. v. Brickhall* (1864), 12 *W. R.* 909.

(*o*) *Hawk. b. 2, c. 27, s. 65.*

sessions; after which it shall be certified in the same manner as the other records of sessions (*p*).

Justices are not bound by the conviction, as first drawn up, but may return a more formal and amended conviction according to the truth of the facts, but this must be done before the conviction has been quashed on appeal to the sessions or removed by *certiorari* and quashed (*q*).

The writ of *certiorari*, as has been observed, issues from the crown office, and enough has been introduced respecting its form, so far at least as is necessary to be inserted here. The attorney for the party applying for it or receiving it, if it be directed to a session respecting *an order*, carries it, together with the recognizance to prosecute, to the clerk of the peace, who draws up on parchment a record of the order, in conformity to the entries made in the sessions book. If the subject-matter be a poor-rate, then, as the rate itself cannot be removed, the entry of appeal must include the title of the rate and the allowance by the justices.

Whatever form the return assumes, the clerk of the peace, if the return is from the sessions, or the single justice, annexes the orders to the writ and remits them to the crown office, there to be filed (*r*).

Where, on an appeal against an order of removal, the sessions overrule an objection to the insufficiency of an examination, but *grant no case* on the point, a rule for a *certiorari* praying the removal not only of the orders of sessions and removal, but also of the examination on which the latter order was made, with the notice and grounds of appeal will be refused (*u*), for these last form a part of the evidence submitted to the sessions on the hearing of the appeal (*x*).

(*p*) Cro. Jac. 669.

(*q*) *Chaney v. Payne* (1841), 1 Q. B. 712.

(*r*) C. O. R. 1886, r. 233.

(*u*) *R. v. Justices of Yorkshire (West Riding)* (1842), 12 L. J. M. C. 15; 3 Q. B. 792 (*nom. Ex parte The Overseers of Tollerton*), relied on and cited *per cur.* in *R. v. Justices of Buckinghamshire* (1842), 12 L. J. M. C. 29. There the sessions on hearing an appeal against an order of removal confirmed it without granting a case. The court refused to direct the order of removal, *with the examinations on which it was grounded* and the order of sessions, to be brought up by *certiorari*, on the ground that the examinations contained no legal evidence in support of the order of removal. The writ of *certiorari* ought not to require anything more to be returned than the original order of removal, and the proceedings of the sessions thereon on the hearing: *per cur. R. v. Justices of Yorkshire (West Riding)*, *ubi sup.*

(*v*) See *per cur.*, but not decided in *R. v. Rotherham (Inh.)* (1842), 12 L. J. M. C. 17.

A *certiorari* had been duly allowed for bringing up "all orders of sessions made" in the case of an appeal against an order of removal, "*with all things touching the same.*" The clerk of the peace returned not only the order of sessions and original order of removal (*w*), but the notices of appeal and statement of grounds of appeal, from which last it appeared that the appeal ought not to have been heard, or consequently the order of sessions, quashing the order of removal, made. *A case had been refused.* The court held that the return was irregular for stating more than the order of sessions, and would not look to the other matters returned, and decided that the *return*, not the *writ*, ought to be quashed (*x*). But as a new return, if properly made, viz., of the order of sessions simply, would be good on the face of it and would be confirmed, they discharged the rule for a *certiorari* without quashing the return (*y*).

Amendment
of order on
return of writ.

If, upon the return to any writ of *certiorari*, any objection shall be made on account of any omission or mistake in the drawing up of any order or judgment made or given by any justice or justices of the peace, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justice or justices making such order or giving such judgment to have authorised the drawing up thereof free from the said omission or mistake, it shall be lawful for the court, upon such terms as to payment of costs as it shall think fit, to amend such order and judgment, and to adjudge thereon as if no such omission or mistake had existed: provided always, that no objection, on account of any omission or mistake in such order or judgment, brought up upon a return to a writ of *certiorari*, shall be allowed, unless such omission or mistake shall have been specified in the rule for issuing such *certiorari* (*b*).

A defendant was convicted and fined, and imprisonment with hard labour imposed in default of distress (the statute on which the conviction took place not authorising hard labour for such an offence); he paid the fine without appealing to quarter sessions, and it was held on *certiorari* that the conviction must be quashed (*c*). But in a conviction in a similar form, the same defendant appealed to quarter sessions without paying the fine. The quarter sessions, on evidence that the mention of hard labour in the conviction was due to

(*w*) The order of removal may properly be returned: see *R. v. Justices of Yorkshire (West Riding)* (1842), 12 L. J. M. C. 15; 3 Q. B. 792.

(*x*) *R. v. Abergele (Inh.)* (1836), 8 A. & E. 394.

(*y*) See *R. v. Abergele (Inh.)*, *ubi sup.*

(*b*) 12 & 13 Vict. c. 45, s. 7.

(*c*) *R. v. Slade* (1895), 61 L. J. M. C. 273.

an oversight on the part of the magistrate's clerk in drawing it up, amended the conviction under this Act, affirmed the conviction as amended, and dismissed the appeal. And it was held on *certiorari* that the decision of quarter sessions was right (*d*).

A *procedendo* cannot be moved for while the *certiorari* is on the file of the court (*f*).

The judgment of the Divisional Court is given in the shape of a rule, and entered as such in the rule book (*g*). If the party who removes an order of sessions by *certiorari* obtains such judgment, by his rule being made absolute, the recognizance (given under r. 36, C. O. R. 1886, *ante*, p. 506) is discharged as a matter of course (*h*). He is not entitled to receive costs; though, if his rule is discharged, he must pay them as taxed by the master of the crown office (*i*), before the recognizance can be discharged. The discharge of the rule to quash the order of sessions confirms it (*k*). The amount is not confined to the sum mentioned in the recognizance (*l*). For by 5 Geo. 2, c. 19, s. 3, if the order or judgment (*viz.*, of the sessions) shall be confirmed by the court, the person entitled to the costs for the recovery thereof *within* (*i.e.*, at the expiration or after the lapse of (*m*)) ten days after demand upon making oath or such demand, and refusal of payment, shall have an attachment for the contempt, and the recognizance given on the allowance of such *certiorari* shall not be discharged till the costs are paid, and the order so confirmed complied with.

Compelling payment of costs where order or judgment of quarter sessions is confirmed.

However, if the *certiorari* is superseded *quia improvide emanavit*, the party suing it out is not liable to costs, for they were occasioned by an improvident act of the court (*n*). So, if he succeeds in quashing a removed order of removal in part (*o*). But he will not have costs where the removal of the

(*d*) *R. v. Justices of London* (1895), 64 L. J. M. C. 273.

(*f*) *R. v. Clace (Inh.)* (1769), 4 Burr. 2456.

(*g*) See the form: *R. v. St. Peter's in Worcestershire* (1735), Burr. S. C. 27; see *ibid.* p. 595; and Burrow's Preface; also *R. v. Moor Critchell* (1802), 2 East, 222.

(*h*) *R. v. Bray* (1771), Burr. S. C. 682.

(*i*) *R. v. Dore* (1738), Andrews, 352; 2 Nol. 4th ed. 621; *R. v. Edmonds* (1874), 31 L. T. 237.

(*k*) *R. v. Latchford (Inh.)* (1844), 14 L. J. M. C. 20.

(*l*) *R. v. Dore, ubi sup.*

(*m*) *R. v. Ireland* (1789), 3 T. R. 512.

(*n*) *R. v. Wakefield* (n. d.), Sayer on Costs, 306.

(*o*) *R. v. Madley* (1743), 2 Stra. 1198. Order of removal of man, wife, and daughter confirmed at sessions; orders quashed in King's Bench as to the daughter, and confirmed as to man and wife.

order was unnecessary and consequently vexatious; *e.g.*, where the party was not affected by the act of the sessions which was quashed, though it might eventually make him liable to costs (*p*).

Where an order of sessions is brought up with a case reserving points raised on both sides, and the court confirmed the order, but both sides failed upon all the points raised by them, neither party was entitled to costs under 5 Geo. 2, c. 19, s. 2 (*q*).

Again, if a case is sent back to sessions to be re-stated, and is returned amended, and then affirmed, the party removing it originally is not liable to pay costs (*r*), unless he disputes the amended order, instructing counsel, and taking the chance of a judgment of the court in his favour on it (*s*).

The expense of maintaining a pauper between the times of giving judgment at sessions on appeal against his removal, and in the King's Bench, cannot be allowed in the *latter court*, nor will they send back the original order of removal to the sessions, in order that they, by quashing it, may give the appellant those costs under 9 Geo. 1, c. 7, s. 9 (*t*); but if the case is not decided in the term in which it comes on to be argued, it has been made a condition of the adjournment that the costs of maintenance from the last day of that term should abide the event (*u*).

*Notice to Justices of Application for Certiorari to remove Conviction,
or Order of Justices pursuant to Rule 33, C. O. R. 1886.*

To A. B. and C. D., Esquires, two of his Majesty's justices of the peace in and for the county [city or borough] of ———.

Take notice that the King's Bench Division of his Majesty's High Court of Justice at the Royal Courts of Justice, London, will be moved on the ——— day of ———, or so soon after as counsel can be heard [*or, if in vacation*, that application will be made to a Judge in Chambers at the Royal Courts of Justice, London, on the ——— day of ——— at the hour of ——— in the ——— noon], on behalf of E. F. for a writ of *certiorari* to remove into the said division a certain record of conviction [*or order*], under the hands and seals of you the said A. B. and C. D. as such justices as aforesaid, made on or about the ——— day of ———,

(*p*) *R. v. Madley* (1743), 2 Stra. 1198.

(*q*) *R. v. Southampton Dock Co.* (1851), 20 L. J. M. C. 228.

(*r*) *R. v. Hitcham* (1760), Burr. S. C. 489, 504; *R. v. Bray* (1771), *id.* 682.

(*s*) *R. v. Edgeworth* (1791), 4 T. R. 218.

(*t*) *R. v. Moor Critchell* (1802), 2 East, 222; and *R. v. West Cranmore* (1813), 2 Nol. 623, n.

(*u*) See *Overmorton v. Salford* (1762), 1 W. Bla. Rep. 436.

whereby the said E. F. was convicted of [*here describe the offence, or describe concisely the order intended to be removed*].

Dated, &c.

(Signed) E. F. [*or by his solicitor, stating himself to be the solicitor for the above-named E. F.*]

[*Note.*—May be signed either by the party on whose behalf the application is to be made, or by his solicitor: but if by the solicitor, he must state that he is the solicitor for the applicant above named.]

Notice to Justices of Application for Certiorari to remove Order of Sessions on Appeal pursuant to Rule 33, C. O. R. 1886.

To A. B. and C. D., Esquires, two of his Majesty's justices of the peace in and for the county [*city or borough*] of ———.

Take notice that the King's Bench Division of his Majesty's High Court of Justice at the Royal Courts of Justice, London, will be moved on the ——— day of ———, or so soon after as counsel can be heard [*or, if in vacation, that application will be made to a Judge in Chambers at the Royal Courts of Justice, London, on the ——— day of ——— at the hour of ——— in the ——— noon*] on behalf of [*the inhabitants of the parish of ——— in the county of ———*] for a writ of certiorari to remove into the said court all and singular orders made by the keepers of the peace and justices in and for the county [*city or borough, &c.*] of ——— or some of them at a general sessions of the peace held at ——— in and for the said county on or about the ——— day of ——— last, upon an appeal between [*the guardians of the poor of the ——— Union in the county of ———*], appellants, and [*the guardians of the poor of the ——— Union in the county of ———*], respondents, touching an original order of two justices for the removal of E. F. from the said parish of ——— to the parish of ——— in the said union [*or as the case may be*]. Upon the hearing of which said appeal the said original order was quashed [*or affirmed*].

Dated, &c.

(Signed) ——— of ———.

Solicitor for the above-named inhabitants of the said parish of ———.

[*Note.*—May be signed either by the party on whose behalf the application is to be made, or by his solicitor: but if by the solicitor, he must state that he is the solicitor for the applicant above named.]

Affidavit of Service of Notice of Application for Certiorari for Conviction or Order of Justices, or Order of Sessions.

In the High Court of Justice,
King's Bench Division.

I, G. H., of ———, clerk to ———, solicitor for E. F., make oath and say:—

1. That I ——— did on the ——— day of ——— serve A. B., Esquire, one of his Majesty's justices of the peace in and for the county of ———, with the notice hereunto annexed, marked A., by delivering a true copy of the said notice to the said A. B. at ———, in the said county [*or where the service is not personal, as follows*], That I ——— did on the ——— day of ——— also serve C. D., Esquire, one other of his Majesty's justices of the peace in and for the said county, with the said notice, by delivering a true copy of the said notice to and leaving the same with [*the wife, clerk or servant*] of the said C. D., at the house or residence of the said C. D., situate at ——— in the said county.

If Order of Sessions, add

(x) 2. That the said A. B. and C. D. were present at the sessions of the peace in and for the said county when the appeal mentioned in the said notice was heard, and were and are two of his Majesty's justices of the peace in and for the said county, by and before whom the order of sessions mentioned in the said notice was made.

Sworn, &c.

G. H.

Filed on behalf of ———.

Return to Writ of Certiorari.

Indorse the writ thus :

The execution of this writ appears by the Schedules (y) hereunto annexed. The answer of A. B., Esquire, one of the keepers of the peace and justices within mentioned.

To be signed and sealed by one of the justices. (L. S.)

SECTION 10.

OF MANDAMUS TO THE SESSIONS.

The subject of the control of the King's Bench Division has been touched upon incidentally in previous observations on the trial of respited appeals, and on the entry of appeals (z).

The control by mandamus of the order of proceeding at quarter sessions, according to the rules of practice which there prevail in hearing appeals, is a part of the jurisdiction of the King's Bench Division, which it will not be inclined to exercise unless it be apparent that gross injustice will follow the refusal of that remedy (a). Accordingly, the court refused a mandamus to sessions to re-hear an appeal dismissed by the justices because the appellant refused to conform to the practice of the sessions (b). So a mandamus will not issue where sessions have refused to respite the trial of an appeal on the absence of a material witness, where full notice had been given, and both parties attended to try, unless on payment of costs of the day, according to their usual practice (c).

(x) In the case of city or borough sessions held before the recorder only, this paragraph is not necessary.

(y) The schedules consist of the indictment orders and other documents to be returned.

(z) *Ante*, p. 461 *et seq.*

(a) *R. v. Justices of Suffolk* (1817), 6 M. & S. 56, *per* Lord Ellenborough; *R. v. Justices of Norfolk* (1834), 5 B. & Ad. 990, *per* Lord Denman.

(b) *R. v. Justices of Suffolk*, *sup.*; and *R. v. Topham* (1810), 12 East, 546, which seems *contra*, proceeded on special circumstances.

(c) *R. v. Justices of Monmouthshire* (1831), 1 B. & Ad. 895.

Again, where, by the practice of a sessions, eight days' notice of appeal against an order of removal was required at the first sessions, but fourteen days' notice of an adjourned appeal, and an appeal was dismissed for want of sufficient notice for the second sessions, the practice, being considered by the court to be reasonable, was upheld (*d*). But if the sessions depart from their usual rule of practice in refusing to hear an appeal, the court above will interfere (*e*). Where a court of quarter sessions dismissed an appeal against an order of removal for non-compliance with their practice, which stipulated for an additional notice, contrary to 9 Geo. 1, c. 7, s. 8, which requires only a reasonable notice of appeal, the court granted a mandamus, and directed the sessions that their province was to determine whether a reasonable notice of appeal had been given, and if not to adjourn the hearing of the appeal to the next sessions, and to determine it finally there (*f*). No mandamus lies to a session to receive evidence which they have rejected, its admissibility being exclusively a question for them (*g*). If the sessions rightly refuse to hear the appeal, the King's Bench Division will not compel them to hear it, on the ground that they so refused for insufficient reasons (*h*). But the court will interfere, where necessary for the purposes of justice, to control the discretion of sessions to make rules for the governance of practice of sessions; as where an appellant gave fourteen days' notice of appeal, calculating one day exclusive of that of giving the notice, and the other day inclusive of the first day of the sessions, the appeal was dismissed for want of compliance with a rule of the sessions, that such a notice should be "exclusive of the day of the notice, and of the day of holding the sessions at which the appeal was to be tried," a mandamus issued to compel the hearing of the appeal (*i*). And where sessions make a rule as to notice on appeals contrary to that made by the Act governing the appeal a mandamus will issue (*k*). A like decision took place where the sessions, by their practice, made service of a notice requisite to the hearing of an appeal, though the Act which gave it was silent on the subject (*l*). And again, where, in the absence of any practice of the sessions, and of any

(*d*) *R. v. Justices of Monmouthshire* (1835), 3 D. P. C. 306.

(*e*) *R. v. Justices of Wilts* (1828), 8 B. & C. 380; *R. v. Justices of Gloucestershire* (1835), 3 D. P. C. 298.

(*f*) *R. v. Justices of Norfolk* (1834), 5 B. & Ad. 990; see *R. v. Justices of Kent* (1828), 8 B. & C. 639; and *id.* 640, 641, n.

(*g*) *R. v. Justices of Cambridgeshire* (1822), 1 D. & R. 325.

(*h*) *R. v. Justices of West Riding* (1841), 1 G. & D. 630.

(*i*) *R. v. Justices of Lancashire* (1828), 7 B. & C. 691; *R. v. Justices of Yorkshire (West Riding)* (1833), 5 B. & Ad. 667; *R. v. Recorder of Richmond* (1858), 27 L. J. M. C. 197; *R. v. Slawstone* (1852), 21 L. J. M. C. 145.

(*k*) *R. v. Justices of Yorkshire (West Riding), In re Bower* (1833), 4 B. & Ad. 685, relied on *per cur.* in *R. v. Goodenough* (1835), 2 A. & E. 469.

(*l*) See *R. v. Justices of Staffordshire* (1836), 4 A. & E. 842; *R. v. Bird and others*, [1898] 2 Q. B. 340.

statutory provision, they required notice of trial of a respited appeal (*m*).

Where a quarter sessions improperly dismissed an appeal on an unfounded objection of a nature preliminary to its being heard, viz., to their jurisdiction to entertain it at all, the court compelled them by a mandamus to hear it, even though a witness had been examined before the objection was taken (*n*); but otherwise where the dismissal was not a declining of jurisdiction but a decision on an appeal (*o*).

If the sessions refuse to hear an appeal on the ground of a practice of their own, which is, though unnecessary, not so unreasonable as to call for interference, a mandamus will not issue (*p*); but otherwise where the practice on which the sessions rely proves doubtful and indistinct (*q*). Where the sessions, on appeal, decide, on a point preliminary to the whole case, or to the reception of a particular piece of evidence, that they will not hear the case further, their decision is conclusive if the point involve matter of fact only; otherwise if it raise a point of practice which the court can perceive to be matter of law. In the latter case a mandamus will issue, in the former not. The question whether a statement of grounds of appeal gives sufficient information to the opposite side is a matter of fact (*r*); and an objection to the admissibility of a document to prove the renting of a tenement is also for the sessions (*s*); but where the objection taken is a preliminary one, and goes to oust the jurisdiction of the sessions, it makes no difference that it was not taken till after a witness had been examined by the respondents (*t*).

Where the sessions reject evidence tendered by the respondents in reply, on the ground that the tender of it has been prefaced by remarks of the advocate tendering it, contrary to the usual practice of the sessions, the court would not interfere by mandamus on the ground that it would be in effect ordering a re-hearing; but it was said, that if they had improperly declined to hear one side at all, it would be the same as refusing to hear the appeal, and then the court would have interfered (*u*).

If sessions have dismissed an appeal on the ground that there was a want of reasonable notice in point of fact, they

(*m*) *R. v. Justices of West Riding* (1833), 5 B. & Ad. 667.

(*n*) *R. v. Goodrich* (1850), 19 L. J. Q. B. 413; *R. v. Justices of Gloucestershire* (1830), 1 B. & Ad. 1; *R. v. Frieston* (1833), 5 B. & Ad. 597.

(*o*) *R. v. Recorder of Liverpool* (1850), 20 L. J. M. C. 35.

(*p*) *R. v. Justices of Montgomeryshire* (1845), 2 New Sess. C. 78.

(*q*) *R. v. Justices of Derbyshire* (1852), 22 L. J. M. C. 31.

(*r*) *R. v. Kesteren* (1844), 13 L. J. M. C. 78.

(*s*) *R. v. Frieston*, *sup.*

(*t*) *R. v. Justices of Gloucestershire*, *sup.*; see also *R. v. Brown* (1857), 26 L. J. M. C. 183.

(*u*) *R. v. Justices of Carnarvon* (1820), 4 B. & A. 86.

will not be interfered with; but if the sessions have dismissed an appeal, on the ground of the invalidity in point of law of the notice of appeal which was not invalid, a mandamus will issue (*x*). As, for instance, if they were to hold that personal service of a notice was necessary when it was not, or that a notice served was invalid in law when it was valid, the court would compel them to hear the appeal (*y*); or that the appellants were too late in applying for a copy of the depositions, upon which an order of removal was made under 11 & 12 Vict. c. 31, s. 9, when in law they were in time (*z*); and it is immaterial whether the refusal to adjudicate takes place upon an objection made during the respondent's case or the appellant's (*a*).

Upon the cases of *R. v. Kesteren* (*b*) and *R. v. The Freeman of Leicester* (*bb*) being cited (*c*) in support of the proposition that the sessions were the sole judges of the fact whether sufficient proof of due notice of appeal had been given, Blackburn, J., said, "Is that so? Are the justices to be the sole judges of the facts with regard to a preliminary point relating to their jurisdiction? But I do not think the justices have decided this as a matter of fact, but as a matter of law. I think it was a question of law. The fair inference from the affidavits is, that the justices thought there was no legal evidence that the notice was fixed to the church door. Therein I think they were wrong. I put out of consideration the evidence of the contents of the written paper handed by the parish clerk to the witness; but it is clearly in evidence that there was a notice fixed on the church door relating to the stopping up of this way. In the absence of evidence to the contrary, I think that that was *primâ facie* evidence that a proper notice had been given on the church door. With regard to the time when it was fixed, *primâ facie* it must be presumed to have been first stuck up when it was first seen." And the rule was made absolute for a mandamus (*d*). But where an appeal against a local rate was dismissed, on the ground that by the local statute the amount of the rateable value of the person assessed was to be taken at such value as the person was assessed for in the last preceding poor's rate, and that therefore, the amount was conclusively fixed by the poor rate, and that the sessions, therefore, had no jurisdiction to go into evidence of value to impeach the poor rate assessment; the

(*x*) *R. v. Recorder of Liverpool* (1850), 15 Q. B. 1070; *R. v. Justices of Bucks* (1854), 24 L. J. M. C. 15; *R. v. Justices of Salop* (1854), 24 L. J. M. C. 14; *R. v. Recorder of Leeds* (1861), 30 L. J. M. C. 86.

(*y*) *R. v. The Deputies of the Freeman of Leicester* (1850), 15 Q. B. 671.

(*z*) *R. v. Recorder of Richmond* (1858), 27 L. J. M. C. 197.

(*a*) *R. v. Brown* (1857), 26 L. J. M. C. 183.

(*b*) *R. v. Kesteren* (1844), 13 L. J. M. C. 78.

(*bb*) *R. v. Deputies of the Freeman of Leicester, sup.*

(*c*) *R. v. Justices of Essex* (1864), 34 L. J. M. C. 41.

(*d*) *Ibid.*

court refused a mandamus, on the ground that the dismissal was *not a declining of jurisdiction*, but a decision on the hearing of the appeal, and that the court has no power to issue a mandamus whether the construction put upon the act by the recorder was *right or wrong*. And the court say, "Here there was no question as to any preliminary step, the appeal is duly entered, called on, and argued, and decided. Now, whether the decision proceeds upon a question of law or fact is wholly immaterial, it is equally a decision on the appeal. . . . This is a declining to hear further evidence, because the evidence already adduced, viz., the poor rate, concludes the parties" (e).

So, where an appeal was formally entered at a sessions, as an appeal by an individual named, against the accounts of the "*churchwardens and overseers*" of a parish, and the appellant served a notice of it directed to the *overseers* only, it was held that as the churchwardens had not, in fact, received or disbursed any parish money, or kept any account, it was evident to one looking at the subject-matter of the appeal, that it was substantially against the accounts of the overseers, to whom notice had been given, and the sessions were ordered to hear the appeal (f).

It may turn out a safe criterion, by which to judge whether the court above will or will not interfere by mandamus with those decisions of a quarter sessions which hinge on its own rules, to consider, whether the point be one of reasonable practice for the regulation of its own proceedings, and, as such, necessarily within its own discretion to adjudicate on, or one which also involves a legal question, and of which accordingly, though the magistrates are judges, they are not sole judges (g). The question which frequently occurs, viz., what is that reasonable notice of appeal which gives a court of quarter sessions jurisdiction to hear it? is one of the latter kind; and in *R. v. Justices of Wilts* (h), the court interposed to prevent what appeared to them an unjust result of a novel practice at the sessions (i).

How man-
damus is to be
applied for.

By rule 60 of the Crown Office Rules, 1886, every application for a prerogative writ of mandamus shall, during the sittings, be made to a Divisional Court of the King's Bench Division by motion for an order *nisi*; and in the vacation to a judge

(e) *R. v. Recorder of Liverpool* (1850), 20 L. J. M. C. 35.

(f) *R. v. Justices of Norfolk* (1831), 2 B. & Ad. 944.

(g) Lord Denman, in *R. v. Frieston (Inh.)* (1833), 5 B. & Ad. 597, says, "The cases where this court has interfered have turned upon matters of preliminary practice, and have arisen where the court thought the practice not in its own nature legal, or not consistent with the rules by which the sessions themselves professed to be guided": see *R. v. Pawlett* (1873), L. R. 8 Q. B. 491.

(h) *R. v. Justices of Wilts* (1808), 10 East, 404.

(i) See *R. v. Justices of West Riding* (1831), 5 B. & Ad. 667; *Ex parte Blues* (1855), 24 L. J. M. C. 138; *R. v. Pawlett, ubi sup.*

in chambers for a summons to show cause. By rule 61 notice shall be given by the order *nisi* for a mandamus to every person who by the affidavits on which the order is moved shall appear to be interested in or likely to be affected by the proceedings, and to any person who, in the opinion of the court or judge, ought to have such notice. By rule 62 the order *nisi* shall be served upon each person to whom notice is given by the order, as well as on the party whom the order requires to show cause. By rule 63 persons affected may show cause. By rule 64 the order absolute for a mandamus need not be served. By rule 65 the writ of mandamus if directed to one person only is served on that person, if directed to more than one person the original is served on one and copies on the others. By rule 76 no order for the issuing of any writ of mandamus shall be granted unless at the time of moving an affidavit be produced by which some person shall depose upon oath that such motion is made at his instance as prosecutor, and if the writ be granted the name of such person shall be endorsed on the writ as the person at whose instance it is granted. By rule 77 every application for the costs of a mandamus shall, unless the court or a judge shall otherwise order, be made before the fifth day of the sittings next after that in which the right to make such application accrued, and shall be upon notice of motion to be served eight days before the day named therein for moving. By rule 78 the party moving for costs shall leave at the crown office department a notice for the production in court of all the affidavits filed in support of and in opposition to the original order. By rule 79 every application for a writ of mandamus to justices to enter continuances and hear an appeal shall be made within two calendar months after the first day of the sessions at which the refusal to hear took place, unless further time be allowed by the court or a judge, or unless special circumstances appear by affidavit to account for the delay to the satisfaction of the court. Where the time has passed within which the sessions is directed by statute to be held at which the act required to be done ought to have been done and was omitted to have been done, a mandamus may nevertheless issue to compel them to do the act at a sessions holden at a subsequent time to that mentioned in the statute (1).

Costs.

Within what time mandamus to be applied for.

Mandamus to hold sessions *nunc pro tunc*.

(1) *Mayor of Rochester v. The Queen* (1858), 27 L. J. Q. B. 434.

CHAPTER II.

OF ORDERS IN BASTARDY, AND PROCEEDINGS
CONCERNING THEM.

The mother's liability for her bastard's maintenance.

At common law the father is not liable for the maintenance of his bastard child, and a promise made by him to the mother of the child to pay her if she will support it is made without consideration (*a*); but contracts by the father with the mother to supply the child with necessaries for a certain sum payable in a particular manner were upheld since 7 & 8 Vict. c. 101, s. 3 (repealed by 8 & 9 Vict. c. 10, but replaced by sect. 3 of that Act, which is substantially the same), in *Smith v. Roche* (*b*), and *Follitt v. Koetzow* (*c*).

The mother's liability arises under 4 & 5 Will. 4, c. 76, s. 71, which enacts, that the mother of every child, born a bastard after that Act, so long as she shall be unmarried, or a widow, shall be bound to maintain such child as part of her family, until such child shall attain the age of sixteen, and all relief granted to such child under the age of sixteen shall be considered as granted to such mother: provided always, that such liability of such mother shall cease on the marriage of such child if a female. This liability is personal only, and there is no provision by which when she dies and leaves an illegitimate child under sixteen surviving her, and leaves money which might be sufficient to provide for its maintenance, that money shall be so applied by her representative (*d*).

Before the passing of 4 & 5 Will. 4, c. 76, justices in quarter sessions had a clear original jurisdiction, under 13 & 14 Car. 2, c. 12, s. 19, to make orders of filiation in bastardy; but the order was much more commonly made by two or more (*e*) justices, under the statute of Elizabeth, and brought before the sessions by way of appeal. On such an appeal it was held, that the sessions, having original jurisdiction, might

(*a*) *Mortimore v. Wright* (1840), 6 M. & W. 482; *Seaborne v. Maddy* (1840), 9 C. & P. 497; *Furillo v. Crowther* (1826), 4 D. & R. M. C. 1; *Crowthurst v. Laversack* (1822), 8 Ex. 208.

(*b*) (1859), 28 L. J. C. P. 237.

(*c*) (1860), 29 L. J. M. C. 128.

(*d*) *Ruttinger v. Temple* (1863), 33 L. J. Q. B. 1.

(*e*) *Hatton's case* (1696), Salk. 477.

not only quash the order of bastardy appealed from, but might make a new order on another person (*f*).

By 4 & 5 Will. 4, c. 76, the court of quarter sessions was constituted by sect. 72 the only tribunal, where a bastard had become chargeable to the parish, which could make an order on the putative father of the bastard for its support.

By 2 & 3 Vict. c. 85, guardians of a union in the like case were enabled to apply to petty sessions for an order without appeal, and were prohibited from going to the quarter sessions.

The jurisdiction of quarter sessions in bastardy cases is now entirely appellate.

The clause giving the appeal is sect. 4 of 7 & 8 Vict. c. 101, but the procedure is now governed by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 31), under which the appeal must be made to the next practicable court of general or quarter sessions having jurisdiction, and holden not less than fifteen days after the day on which the decision was given upon which the order was founded. Notice must be given by the appellant within seven days after the day on which the decision was given. Such notice must be in writing, and must set out the general grounds of such appeal (*g*), and must be served on the other party (not on the solicitor (*h*)), and on the clerk of the court of summary jurisdiction (*h*); but such notice need not be addressed to the magistrates (*i*). The appellant must, within three days after the day on which he gave notice of appeal, enter into a recognizance before a court of summary jurisdiction, with or without a surety or sureties as that court may direct, conditioned to appear at the said sessions and to try such appeal, and to abide the judgment of the court of appeal thereon, and to pay such costs as may be awarded by the court of appeal, or the appellant may, if ordered, give such other security by deposit of money as the court deem sufficient; but the court fixing the deposit must have before them the notice of appeal, therefore a deposit fixed before notice of appeal given is bad (*k*). Every notice in writing required by sect. 31 of 42 & 43 Vict. c. 49, to be given by the appellant shall be in writing signed by him or his agent, and may be transmitted as a registered letter by the post in the ordinary way, and shall be deemed to have been served at the time when it would be delivered in the ordinary course of post.

Clause of Act giving the appeal.
Notice of appeal.

The recognizance may be entered into before any court of

(*f*) *Barrel's case* (1696), 1 Mod. R. 20; *R. v. Smith* (1630), 2 Bulst. 342.

(*g*) *R. v. Shingler* (1886), 17 Q. B. D. 49.

(*h*) *R. v. Justices of Oxfordshire*, [1893] 2 Q. B. 149 (C. A.).

(*i*) *R. v. Justices of Essex*, [1892] 1 Q. B. 490.

(*k*) *R. v. Justices of Anglesey*, [1892] 2 Q. B. 29.

summary jurisdiction, whether acting for the same county as the court from whose order the appeal is brought or not (*l*).

No notice of the recognizance is now required (*m*).

By 8 & 9 Vict. c. 10, it is enacted, that in 7 & 8 Vict. c. 101, and in 8 & 9 Vict. c. 10, the word "recorder" shall be taken to apply to any person who shall preside as the judge at any court of general quarter sessions held for any city, borough, liberty, or other place of limited jurisdiction.

The evidence
of the mother.

The evidence of the mother is expressly made admissible by 8 & 9 Vict. c. 10, s. 6, whereby it is enacted, that on the trial of any such appeal before any court of quarter sessions, the justices therein assembled, or the recorder (as the case may be), shall hear the evidence of the said mother, and such other evidence as she may produce, and any evidence tendered on behalf of the appellant, and proceed to hear and determine the said appeal in other respects according to law, but shall not confirm the order so appealed against unless the evidence of the said mother shall have been corroborated in some material particular by other testimony to the satisfaction of the said justices in quarter sessions assembled, or the said recorder.

The meaning of the above section is, that if upon the trial of the appeal the mother is examined in support of the order, the court of quarter sessions must not confirm the order without evidence in corroboration of her testimony, but it is not absolutely necessary that she should be examined, as, for instance, if the appellant, having relied upon points of law as preliminary objections to the hearing, and having had those decided against him, retires from the case (*n*); or, perhaps, if she dies before the appeal comes on to be heard, and has been examined and cross-examined by or on behalf of the putative father at the hearing of the application before the petty sessions (*o*), though at the hearing at petty sessions it has been decided that the order cannot be made without her evidence being given *visâ voce* (*p*).

Corroborating
evidence.

It is a corroborating circumstance that the alleged father has been seen with the mother at the time and place fixed by her as the occasion of the connexion from which the conception of the child resulted, under circumstances which would have allowed of the connexion taking place. So, proof of any admission made by the defendant that the child was

(*l*) *R. v. Justices of Durham*, [1895] 1 Q. B. 801.

(*m*) *R. v. Justices of West Riding of Yorks* (1882), W. N. 34.

(*n*) *R. v. Justices of Buckinghamshire* (1849), 18 L. J. M. C. 113.

(*o*) See *R. v. Armitage* (1872), L. R. 7 Q. B. 773; *R. v. Justices of Leicestershire* (1850), 19 L. J. M. C. 209; *R. v. Ravenstone* (1793), 5 T. R. 373; *R. v. Clayton* (1802), 3 East, 58.

(*p*) *R. v. Armitage*, *ubi sup.*

his, or that he had connexion with her. If there be some evidence in corroboration, the King's Bench Division will not interfere (*q*). Evidence that appellant and respondent were seen "out together evenings in the lanes," and that after the birth of the child appellant asked if the respondent "was going to swear the child," was held corroboration in some material particular to satisfy sect. 4 of the Bastardy Laws Amendment Act, 1872 (*r*).

When the summons is taken out more than twelve months from the birth of the child, it will be a necessary part of the applicant's proof that the putative father has, within such twelve months, paid money for the maintenance of the child (*s*). The payment should be deposed to in writing on oath before the justices issue the summons, but the absence of such deposition is an irregularity cured by the appearance of the putative father (*t*). Nor is it necessary that the evidence of proof of the payment of money, if given by the mother, should be corroborated, either on the application for, or on the hearing of, the summons (*u*).

The putative father may be examined in his own defence. An agreement with the mother for the payment by the putative father of a sum of money to her, in respect of and for the future support of the child, is not a bar to an application for an order so as to oust the jurisdiction of the justices (*x*). Nor is it the more a bar because she agreed to release him from all further payment in respect of the child; but the payments made ought to be taken into consideration with the other circumstances, and the order made accordingly (*y*).

If the mother has fixed the time when the connexion took place which resulted in the birth of the child, evidence is admissible, on the part of the alleged father, to show that another person had connexion with her at or about that time, from which it might be inferred that he was the father of the child (*z*); but in such a case the mother ought to be cross-examined as to the latter fact. Though, however, she may be cross-examined as to connexion with men other than the alleged father on occasions which could have no reference to the paternity of the child, her answers then go to her credit only, and must be taken as conclusive, and evidence should

Evidence on hearing.

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- (*q*) *R. v. Pearcey* (1852), 16 Jur. Q. B. 193.
 - (*r*) *Harvey v. Anning* (1903), 87 L. T. 687.
 - (*s*) *R. v. Berry* (1859), 28 L. J. M. C. 86.
 - (*t*) *R. v. Fletcher* (1871), L. R. 1 C. C. R. 320.
 - (*u*) *Hodges v. Bennet* (1860), 29 L. J. M. C. 224.
 - (*x*) *Follitt v. Koetzow* (1860), 29 L. J. M. C. 128.
 - (*y*) *Ibid.*
 - (*z*) *Garbutt v. Simpson* (1863), 32 L. J. M. C. 186.

not be admitted to contradict her (a); but if such evidence, in contradiction, be admitted, the witness who gives it, if false, may be convicted of perjury (b).

Quashing the order at sessions, final.

When the justices at quarter sessions have the order before them, and hear the evidence and quash the order, on the ground that the evidence of the mother is not corroborated in some material particular, their decision is upon the merits and is conclusive, and the defendant is freed for ever (c).

But where on the hearing of an appeal at quarter sessions the respondent and her witnesses were not present, and an adjournment was applied for but appellant declined to accede, and the sessions directed the case to proceed and quashed the order, it was held that the order of quarter sessions was not a decision on the merits, and fresh proceedings might be taken before the justices (d).

Costs of the appeal.

If the case has been called on, but on a preliminary objection for a defect in the notice or such like it is dismissed, costs may be given under 7 & 8 Vict. c. 101, s. 4 (e). So, the entry of an appeal and the calling on of the case and dismissal of the case for the non-appearance of one of the parties, would justify the court in giving costs (f).

Abandonment of the appeal.

By 8 & 9 Vict. c. 10, s. 5, if at any time before the hearing of the appeal the putative father, who shall have entered into his recognizance for the trial of the appeal and the payment of costs, shall give notice in writing of his abandonment of the appeal to the mother of the child, in whose favour the order shall have been made, and to the justice or justices before whom the said recognizance shall have been taken, and shall pay or tender to the said mother all sums then due under the said order, and such costs and expenses as she shall have incurred by reason of such notice of appeal, the said recognizance so entered into by the said putative father shall not be estreated or in any manner put in force or otherwise proceeded with.

Jurisdiction of justice to make the order.

The jurisdiction to make the order is conferred now by the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 3, which enacts, that any single woman who may be with child, or who may be delivered of a bastard child after the passing of this Act, may either before the birth or at any time within twelve months from the birth of such child or at any time thereafter, upon proof that the man alleged to be the

(a) *R. v. Gibbons* (1862), 31 L. J. M. C. 98.

(b) *Ibid.*

(c) *R. v. Glynn* (1871), L. R. 7 Q. B. 16; *R. v. Tenant* (1726), 2 Ld. Raym. 1423.

(d) *R. v. May* (1880), 5 Q. B. D. 382; *sub nom. R. v. Philips*, 42 L. T. 772; *sub nom. R. v. Justices of Essex*, 44 J. P. 538.

(e) See *R. v. Recorder of Exeter* (1843), 5 Q. B. 342; decided on 4 & 5 Will. 4, c. 76.

(f) See *R. v. Stamper* (1841), 1 Q. B. 119.

father of such child has within the twelve months next after the birth of such child paid money for its maintenance, or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child, make application to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough or place in which she may reside, for a summons to be served on the man alleged by her to be the father of the child, and if such application be made before the birth of the child, the woman shall make a deposition upon oath stating who is the father of such child; and such justice of the peace shall thereupon issue his summons to the person alleged to be the father of such child, to appear at a petty sessions to be holden after the expiration of six days at least for the petty sessional division, city, borough or other place in which such justice usually acts.

The term "single woman" in the above section includes a widow (*g*) and a married woman living separate from her husband (*h*), but not a woman who married after the birth of the child and is living with her husband at the date of the application (*i*); nor if she is living separate from her husband at the date of the application, he having turned her out of doors and refused to maintain her or her child on first hearing of its existence, as there would be two people liable to maintain the child (*k*); nor even where the mother took out a summons against the putative father before her marriage, but was prevented from serving it by his default (*l*).

What women are within the operation of the Act.

The decision in *Stacey v. Lintell* has been followed in the most recent case (*m*), in which the various cases are considered and commented upon.

But where an illegitimate child is being maintained by the guardians of a union or parish, justices have jurisdiction, upon the application of the guardians, to make an affiliation order against the putative father of the child under sect. 5 of the Bastardy Laws Amendment Act, 1873 (36 & 37 Vict. c. 9), s. 5, notwithstanding that the child's mother has married and her husband is able to maintain it (*n*).

No order can be made unless the child was born in England (*o*) or Scotland (*p*), but an English woman delivered

(*g*) *R. v. Wymondham* (1843), 2 Q. B. 541.

(*h*) *R. v. Collingwood* (1848), 17 L. J. M. C. 168; *R. v. Pilkington* (1853), 2 E. & B. 546; *sub nom. Ex parte Grimes*, 22 L. J. M. C. 153.

(*i*) *Stacey v. Lintell* (1879), 4 Q. B. D. 291.

(*k*) *Peatfield v. Childs* (1899), 63 J. P. 117.

(*l*) *Tozer v. Lake* (1879), 4 C. P. D. 322.

(*m*) *Jones v. Davies*, [1901] 1 Q. B. 118.

(*n*) *Plymouth Guardians v. Gibbs*, [1903] 1 K. B. 177.

(*o*) *R. v. Blane* (1849), 18 L. J. M. C. 216.

(*p*) 44 & 45 Vict. c. 24, s. 6.

of a bastard child on an English ship on the high seas is within the Act (*q*).

To whom
application
for summons
to be made.

Petty ses-
sional divi-
sion, what.

The application for a summons must be made by the woman to any one justice of the peace acting for the petty sessional division of the county, or for the city, borough, or place in which she may reside. And the term "petty sessional division" is defined by the 8 & 9 Vict. c. 10, s. 10, to be and include any division of a county, riding, or division having a separate commission of the peace, in which one or more petty sessions have been or shall be usually held, or any division for the holding of special sessions formed, or to be formed, under the provisions of 9 Geo. 4, c. 63, or of 6 & 7 Will. 4, c. 12, amending the same. And that where there are two or more petty sessions usually held in any such division, or where any justice acts for two or more of such divisions, he shall require the party, whom he shall summon under 7 & 8 Vict. c. 101, to appear at the petty sessions to be held in any such division as he shall deem fit.

And by 12 & 13 Vict. c. 18, s. 1, every sitting and acting of justices of the peace, or of a stipendiary magistrate in and for any city, borough, or town corporate having a separate commission of the peace, or any part thereof, within England and Wales, at any police court or other place appointed in that behalf, shall be deemed a petty sessions of the peace, and the district for which the same shall be holden shall be deemed a petty sessional division within the meaning of any Acts of Parliament, made or hereafter to be made, having relation to such petty sessions, or to any business to be transacted thereat.

The section is imperative as to the justice to whom application for the summons is to be made, and if application be made to one who does not answer the descriptions above mentioned, the summons and all the proceedings upon it will be void.

Residence of
woman,
where.

A woman is to be taken to reside in a place, so as to give jurisdiction to the justice, where she went to lodge for the purpose of affiliating the child, if she has no other home at the time, and she went there because it was the most convenient place with reference to the meeting of the magistrates for the division, and not for the purposes of fraud, or of harassing the putative father (*r*); but where a woman sleeps one night only in the division she is not resident and the justices have no jurisdiction (*s*); or if a woman goes to lodge in a particular jurisdiction for the mere purpose of getting an order from the justices of that jurisdiction, after having had her application twice dismissed on the merits in another jurisdiction, and without the intention of staying longer than

(*q*) *Marshall v. Murgatroyd* (1870), 6 L. R. Q. B. 31.

(*r*) *R. v. Hughes* (1857), 26 L. J. M. C. 133.

(*s*) *Vevers v. Mains*, Times L. R. 1888, Vol. 4, 724.

might be necessary for that purpose, she does not reside there so as to give the justices jurisdiction (*t*).

If the application be made within twelve months after the birth of the child, the summons need not be issued till after the twelve months has expired, so long as it issue as soon as it can be made available in the opinion of the justice (*u*); and thus, if the putative father absconds before the birth of the child, and the mother does not ascertain his whereabouts until after a twelvemonth after the birth, it is sufficient if she has made her application for a summons within the twelvemonth, and a summons issued after the twelvemonth upon such application is valid (*x*). When the statute says the summons is to issue "thereupon," it does not mean forthwith or immediately (*y*).

Of the issuing of the summons.

Application for summons.

The justice to whom the application is made is, however, the only person who can issue the summons, and, therefore, if an application be made to a justice for a summons, who does not issue the summons within the twelve months, and afterwards and before the issuing of the summons die, no proceedings can be taken on such application (*z*); but where a summons was issued by a justice other than the one to whom the original application had been made, the irregularity was waived by the appearance of the putative father without objection (*a*).

If the application for the summons is made more than twelve months after the birth of the child, there should be proof on oath of the payment of money for its maintenance by the putative father within the twelve months; but any objection on the ground of the absence of such proof affects only the regularity of the summons, for the proceeding is in the nature of a civil suit within 14 & 15 Vict. c. 99, ss. 2, 3, and, therefore, if the defendant appears, and without objection defends the case, and gets a decision on the merits, he waives the irregularity in the process, and by so doing gives the court jurisdiction to hear and decide the suit (*b*), or if he appear and give evidence on his own behalf (*c*), and that whether the summons shows the defect or not (*d*); but if the objection were taken and insisted upon, probably it would be fatal (*e*), and the mere appearance of the defendant without more

Where application made more than twelve months after birth of child.

(*t*) *R. v. Myott* (1863), 32 L. J. M. C. 138.

(*u*) *Ex parte Harrison* (1852), 16 Jur. 726.

(*x*) *Potts v. Cambridge* (1858), 27 L. J. M. C. 62; *R. v. Chagg* (1870), 11 Cox, C. C. 558.

(*y*) *Potts v. Cambridge*, *ubi sup.*

(*z*) *R. v. Pickford* (1861), 30 L. J. M. C. 133.

(*a*) *R. v. Fletcher* (1884), 48 J. P. 407.

(*b*) *R. v. Berry* (1859), 28 L. J. M. C. 86.

(*c*) *R. v. Simmons* (1859), 28 L. J. M. C. 183.

(*d*) *R. v. Berry*, *ubi sup.*; *R. v. Simmons*, *ubi sup.*

(*e*) *R. v. Berry*, *ubi sup.*

would, probably, not be deemed a waiver of the irregularity (*f*).

Of the hearing
of the appli-
cation.

By the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), s. 4, After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person or left at his last place of abode six days at least before the petty session, the justices in such petty session shall hear the evidence of such woman, and such other evidence as she may produce, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father, and if the evidence of the mother be corroborated in some material particular by other evidence to the satisfaction of the said justices, they may adjudge the man to be the putative father of such bastard child; and they may also if they see fit, having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of the bastard child, or to any person who may be appointed to have the custody of such child under the provisions of the 7 & 8 Vict. c. 101, of a sum of money weekly, not exceeding five shillings a week, for the maintenance and education of the child, and of the expenses incidental to the birth of such child, and of the funeral expenses of the child, provided it has died before the making of such order, and of such costs as may have been incurred in the obtaining of such order: and if the application be made before the birth of the child, or within two calendar months after the birth of the child, such weekly sum may, if the said justices think fit, be calculated from the birth of the child. Then follow the provisions for enforcing the order by distress and commitment, which are not sufficiently connected with the present subject to require setting forth here. So, if the putative father appear at the petty sessions, and without objecting to the irregularity of the summons give notice of appeal, and enter into recognizances, he will not be allowed afterwards to object that there was a want of jurisdiction on that ground (*g*).

Irregularity
in summons
cured.

Service of the
summons.

The summons may be served personally, or by leaving the same at the last place of abode of the putative father, six days at least before the petty sessions, and in cases where the putative father resides out of the petty sessional district where the mother applies for the summons, its service may be proved by affidavit (*h*).

“Last place
of abode” of
defendant.

By the words “last place of abode” is meant the present place of abode, if the party have any, or the last which he had if he has ceased to have any. It is not, therefore, sufficient in default of personal service to serve it at a house where

(*f*) *R. v. Justices of Carnarvon* (1835), 5 Nev. & M. 364.

(*g*) *R. v. Justices of Wiltshire* (1840), 12 A. & E. 793; *R. v. Stoddart* (1841), 1 G. & D. 654.

(*h*) 36 & 37 Vict. c. 9, s. 4.

the defendant formerly lodged, but did not lodge at the time of the service, and where it did not reach him till after the order was made, although the server believed him to reside there, and the mistress of the house said his clothes were still there (*i*); but the service was held sufficient where it was left at the house of the defendant's father with whom the defendant had always lived up to a fortnight before the service, and which place he left in anticipation of the bastardy proceedings, although he at the time thereof was residing and had obtained employment on a farm in a different part of the country, and as he stated had ceased to reside with his father, and had no intention of returning to him, and was not aware of the proceedings till they were over (*k*). In that case, however, the court deemed the residence away from his father's to be but temporary, and that no fresh permanent abode had been acquired; and where a defendant had gone to America shortly before service of the summons at his father's house, and no evidence was offered that he had a fixed place of abode in America, the summons was held to be properly served (*l*). In one case (*m*), upon an application before birth, service was held to be good when made on the 4th October, 1866, at the house where the putative father had been residing until the first of the same month, when he left it with the intention of going to America, to which country he did go, and where he remained till March in the following year, the child having been born on the 29th of October, 1866, and an order made in his absence, and without his knowledge, was upheld. In *Potts v. Cumbridge* (*n*) an application for a summons was made within twelve months after the birth of the child, but no summons was issued, as the residence of the father was not ascertainable, but on a second application being made, after the expiration of twelve months, a summons was issued, and on a case being granted, it was held that the proceedings were regular, as the second application must be considered as a continuation of the first. A temporary absence from home when the summons is served, and no notice of it, are grounds for an application to the discretion of the justices to adjourn the hearing (*o*).

Last place of
abode of
defendant.

If the magistrates making the order act upon what they deem due proof of service of the summons, though the order is made with jurisdiction, their decision is open to review if it can be shown that the facts upon which they proceeded failed; as, for instance, that the service, if personal, was made

Decision of
justices as to
service may
be reviewed.

(*i*) *R. v. Evans* (1850), 19 L. J. M. C. 151; *sub nom. Ex parte Rice Jones*, 1 L. M. & P. 357.

(*k*) *R. v. Higham* (1857), 26 L. J. M. C. 116.

(*l*) *R. v. Webb*, [1896] 1 Q. B. 487.

(*m*) *R. v. Damarell* (1867), L. R. 3 Q. B. 50.

(*n*) (1858), 27 L. J. M. C. 62.

(*o*) *R. v. Brown* (1859), 1 L. T. N. S. 29.

by mistake on the wrong person, or the place where the summons was served as being the last place of abode was not his last place of abode (*p*). If an application is made on *certiorari* to quash the order on the above grounds, the affidavits on which it is founded must however also aver that the alleged father was not the father in fact, and had no knowledge of the application or summons (*q*).

In a recent case the Court of Appeal held, that as the jurisdiction of the justices only attached on proof that the summons was duly served, the court had power to inquire into the validity of the service, and might hear evidence in addition to that offered before the magistrates (*r*).

Where service
to be effected.

The service must be within the limits of England or Wales, and a service outside, viz., in Scotland, is not one upon which justices can proceed in the absence of the putative father (*s*).

Six days at
least before
petty sessions.

In computing the "six days at least" before the petty sessions, the whole of the day of the service and of the hearing must be excluded (*t*).

Return of the
summons.

Upon the application after birth the summons is returnable at a petty sessions to be holden after the lapse of six days at the least after the service for the petty sessional division, city, borough or other place in which such justice usually acts. But upon an application before birth, it is provided by 8 & 9 Vict. c. 10, s. 4, that the "said justice to whom any application shall be made by any such woman being pregnant shall summon the man to appear at some petty sessions at which he usually acts, to be held on a day after the time when the said mother shall expect the said child to be born; provided that if on such day the woman shall not have been delivered or the justices shall be satisfied that she has been delivered at so short a period before such day that she cannot appear at the said session, it shall be lawful for the justices thereat to adjourn the hearing of the said case until some other day, and so from time to time until the child shall have been born and the woman shall be able to attend at the said session; and it shall be lawful for the justices at their petty sessions to make an order in respect of any such application so made by such woman so pregnant to a justice as aforesaid if she apply at such petty session within the space of two calendar months from the birth of the child, although more than forty days shall have elapsed from the time when

(*p*) *R. v. Evans* (1850), 19 L. J. M. C. 151.

(*q*) *R. v. Evans, sup.*; *R. v. Davis* (1853), 22 L. J. M. C. 143.

(*r*) *R. v. Farmer*, [1892] 1 Q. B. 639; *sub nom. Reg. v. Justices of Salford*, 40 W. R. 229.

(*s*) *R. v. Lightfoot* (1856), 25 L. J. M. C. 115.

(*t*) *R. v. Justices of Middlesex* (1845), 14 L. J. M. C. 139; *Mitchell v. Foster* (1840), 12 A. & E. 472; *R. v. Justices of Shropshire* (1838), 8 A. & E. 173; *Zouch v. Empsey* (1821), 4 B. & A. 522.

the summons was served upon the alleged father or was left at his last place of abode."

An application for an order and a refusal by justices to make it, even on the merits, is no bar to a fresh application and fresh hearing (*u*); but a distinction has been drawn between a decision on the merits at petty sessions and at quarter sessions, and a decision at the latter on the merits is final (*x*); but where on appeal the order was quashed on a matter of form (*y*), or from the mother and her witnesses being accidentally absent on the hearing of the appeal (*z*), a fresh summons may be issued, the decision at quarter sessions not being upon the merits; but after the previous hearing there must be a fresh application and summons thereon, as the former application is spent by the first hearing, and there is no jurisdiction to hear the case a second time on the same application (*a*).

When prior adjudication makes *res judicata*.

By 35 & 36 Vict. c. 65, s. 5, "No order for the maintenance and education, or for contribution towards the relief of any such child made in pursuance of this Act shall, except for the purpose of recovering money previously due under such order, be of any force or validity after the child, in respect of whom it was made, has attained the age of thirteen years, or after the death of such child; provided that the justices may in the order direct that the payments to be made under it in respect of the child shall continue until the child attains the age of sixteen years, in which case such order shall be in force until that period."

As to order of maintenance.

By 7 & 8 Vict. c. 101, s. 5, all money payable under any order as aforesaid shall be due and payable to the mother of the bastard child in respect of such time, and so long as she lives, and is of sound mind, and is not in any gaol or prison, or under sentence of [transportation]; and after the death of the mother of such bastard child, or whilst such mother is of unsound mind, or confined in any gaol or prison, or under sentence of [transportation], any two justices may, if they see fit, by order under their hands and seals, from time to time appoint some person who, with his own consent, shall have the custody of such bastard child so long as such bastard child is not chargeable to any parish or union. And any

(*u*) *R. v. Machen* (1849), 18 L. J. M. C. 213; *Ex parte Westerman* (1851), 16 L. T. O. S. 420; *R. v. Grant* (1867), 36 L. J. M. C. 89; *sub nom. R. v. Gaunt*, L. R. 2 Q. B. 466; *R. v. Hall and another and Gillespie* (1887), 57 L. T. N. S. 306.

(*x*) *R. v. Glynn* (1871), L. R. 7 Q. B. 16; *sub nom. R. v. Justices of Flintshire*, 20 W. R. 94.

(*y*) *R. v. Padbury* (1879), 5 Q. B. D. 127.

(*z*) *R. v. May* (1880), 5 Q. B. D. 382; *sub nom. R. v. Justices of Essex*, 49 L. J. M. C. 67; *sub nom. R. v. Phillips*, 42 L. T. N. S. 772.

(*a*) *R. v. Thomas* (1863), 8 L. T. N. S. 460; and see facts in *R. v. Hall*, *sup*.

two such justices may revoke the appointment of such person, and may appoint another person in his stead; and every person so appointed to have the custody of a bastard child shall, so long as such child is not chargeable to any parish or union, be empowered to make application for the recovery of all payments becoming due under the order of the court of petty sessions as aforesaid, in the same manner as the mother of such bastard child might have done; and the clerk to the justices making any order on the putative father of a bastard child, or appointing any person to have the custody of such child as hereinbefore provided, shall, as soon as may be, send by post, or otherwise, a duplicate of such order or appointment signed by such clerk to the clerk of the guardians of the union or parish in which the mother of such bastard child resided at the time of the making such order or appointment. Sect. 7. Provided always, that after the death of such mother, or, if such mother be incapacitated as aforesaid, so often as any bastard child, for whose maintenance such order of petty sessions has been made, becomes chargeable to any parish or union by the neglect of the putative father to make the payments due under the orders of justices, then, and in such case, it shall be lawful for any board of guardians of a union or parish, or if there be no such board of guardians, for the overseers of any parish or place, to make such application for the enforcement of the order as might have been made by the mother of such bastard child if alive; but all payments for the maintenance of such child, made in pursuance of such application, shall be made to some person to be from time to time appointed by the justices as hereinbefore provided, and on condition that such bastard child shall cease to be chargeable to such parish or union.

As to amount payable under the order.

In fixing the amount payable under the order, the justices would properly have regard to the ability of the mother to maintain the child, and it would be a circumstance for their consideration if the father had already contracted to provide for it (*b*); and whether such agreement had been or were likely to be carried out or not (*c*).

The court of quarter sessions, on appeal to them against any order made pursuant to the provisions of this Act, may, if they think fit, reduce the amount directed to be paid for the maintenance and education, or on account of the relief of the child named in such order, and they shall thereupon alter the order accordingly (*d*).

Form of the order.

Forms of proceedings in bastardy are issued by the Local Government Board, and are dated 4th August, 1873, and

(*b*) *Smith v. Roche* (1859), 28 L. J. C. P. 237.

(*c*) *Follitt v. Koetzow* (1860), 29 L. J. M. C. 128.

(*d*) 35 & 36 Vict. c. 65, s. 9.

8th January, 1874, and these forms should be followed. In proceedings subsequent to the order of affiliation the forms prescribed under the Summary Jurisdiction Rules, 1886, must be used jointly with those issued by the Local Government Board (*e*).

The truth of facts recited necessary to give jurisdiction can be inquired into on appeal (*f*).

The caption of an order is so far part of it that it may constitute an averment sufficient to make the order good; as where the caption stated that the order was made "before us, the Rev. F. S., clerk, and T. P., esquire, her Majesty's justices of the peace for the said riding, and a majority of the justices now present," and the order was simply signed by them, and it was not otherwise stated that there was a majority of those present, the caption was held to be a sufficient statement to that effect (*g*).

Caption of
the order.

The order must state that it was made at a petty sessions holden for the division, &c. in which the woman resides, and upon a summons issued by and on application made to a justice acting for such division (*h*). An inaccurate description of the petty sessional division would vitiate the order, and the appearance of the putative father does not cure the defect (*j*). The order must state the mother's residence to be within the petty sessional division of the justices (*k*).

The Local Government Board form recites that application had been made to one "acting for this division," but in an order where the word "in" was used instead of "for," it was held that the jurisdiction of the justices sufficiently appeared (*l*).

The order must show that the defendant appears, or if he does not that he was served with the summons six days at least before this day, and that proof of such service was given, or that the summons was left at his last known place of abode six days before the hearing, and that proof of such service was given. But a statement of the appearance of the defendant on the adjournment of the hearing, and a hearing on the merits, will cure the want of an allegation of the service of the summons before the day of hearing (*m*).

Necessary
allegations
in order.

(*e*) For forms, see pp. 538, 539.

(*f*) *R. v. Wilson* (1834), 4 N. & M. 243; *R. v. Evans* (1850), 19 L. J. M. C. 151; *R. v. Davis* (1853), 22 L. J. M. C. 143.

(*g*) *Ex parte Boynton* (1850), 1 L. M. & P. 12.

(*h*) *R. v. Hickling* (1845), 7 Q. B. 880.

(*j*) *R. v. Whittles* (1849), 18 L. J. M. C. 96.

(*k*) *R. v. Higham* (1857), 26 L. J. M. C. 116.

(*l*) *R. v. Milner* (1845), 14 L. J. M. C. 157.

(*m*) *Ex parte Boynton* (1850), 1 L. M. & P. 12.

If the defendant appears the order must state that the evidence was given in his presence and hearing, and if after appearance any special circumstances occurred whereby that averment cannot with truth be made they should be stated on the face of the order (*n*). If the putative father appears by attorney it must be stated that the evidence was given in the presence and hearing of the attorney (*o*), and it is absolutely necessary that the evidence should be stated to have been given in the presence of one or the other (*p*). If the defendant does not appear, the note to the statutory form, by using the words "as is now proved before us" twice with reference to proof of service of the summons on the defendant six days at least before, shows that it is necessary that such fact should be clearly proved, and should therefore be stated (*q*).

If the defendant tender no evidence, then the words "and having also heard all the evidence tendered by" can be omitted (*r*). The order must state that the evidence in corroboration of the mother was in some material particular, and if it omit so to do it will be bad (*s*).

Order bad in part and good in part.

An order may be invalid in one part and enforceable as to the residue, if the bad part of the order can be clearly severed from the good (*t*).

Thus, where an order was made for the payment of a weekly sum from the birth of the child, where it appeared that the birth was more than two months before the application was made, the order was held good as to the payments payable from the date of the application, and was enforced for so much (*u*); but if the bad part of the order cannot be clearly severed from the rest, the order is altogether bad; thus, the giving of costs is merely ancillary to the judgment, and therefore where an order is bad as to the judgment, it is not maintainable as to the costs (*x*). If an order be void for defects appearing on the face of it, it may be treated as no order at all, and the parties be considered in the same situation as if the first justices had declined to make any order at all, or having drawn up an order had refused to sign it (*y*).

Void order may be treated as no order.

But it must be borne in mind, with reference to exceptions or objections to the form of the order or judgment, which are

Power to amend order.

(*n*) *R. v. Duke of Grafton* (1848), 17 L. J. M. C. 125.
(*o*) *R. v. Shipperbottom* (1847), 16 L. J. M. C. 113.
(*p*) *R. v. Duke of Grafton*, *ubi sup*.
(*q*) *R. v. Evans* (1850), 19 L. J. M. C. 151.
(*r*) *R. v. Pearey* (1852), 21 L. J. M. C. 129.
(*s*) *R. v. Read* (1839), 9 A. & E. 619.
(*t*) *R. v. Green* (1851), 20 L. J. M. C. 168; *sub nom. Ex parte Colley*, 16 L. T. O. S. 419; *R. v. Maulden* (1828), 8 B. & C. 78.
(*u*) *R. v. Green* (1851), *sup*.
(*x*) *R. v. Stoke Bliss* (1844), 13 L. J. M. C. 151; *R. v. Green*, *ubi sup*.
(*y*) *R. v. Brisby* (1849), 18 L. J. M. C. 157.

irrespective of the truth and merits of the matters in question, that it has been enacted by the 12 & 13 Vict. c. 45, s. 7, that "if upon the trial of any appeal to any court of general or quarter sessions of the peace against any order or judgment made or given by any justice or justices of the peace, any objection shall be made on account of any omission or mistake in the drawing up of such order or judgment, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justice or justices making such order or giving such judgment to have authorized the drawing up thereof free from the said omission or mistake, it shall be lawful for the court, upon such terms as to payment of costs as it shall think fit, to amend such order or judgment, and to adjudicate thereupon as if no such omission or mistake had existed."

And the decision of the court as to such amendment is final, and not liable to be reviewed in any court (*z*).

But inasmuch as the order can only make the payments by the putative father begin from the date of the application upon which it is made [or from birth if within two months previous to such application], it is a fatal mistake to order the payments to begin from the date of a prior application to a different justice from the one who issued the summons on which the order was made, and is not amendable under the above 7th section, as it is a mistake in substance and not a mistake in form in the drawing up of the order (*a*).

A slight sketch of the more usual proofs of illegitimacy must suffice for this work, for though the difficult questions involved in that subject may arise at quarter sessions, the wisest course for that tribunal will be to make the order applied for subject to a case for the opinion of the King's Bench Division. And, first, the operation of the old statutes of bastardy extended as well to the bastards of married as of unmarried women (*b*), and we have seen to what extent the present one does the same (*c*). To prove a child born of a married woman in the lifetime of the husband to be a bastard, non-access of the husband must be proved by some other evidence than that of the mother (*d*); but if the fact of non-access is found by the justices upon evidence independent of the mother, it is immaterial that she should also have given evidence to that fact (*e*).

(*z*) Sect. 9.

(*a*) *R. v. Tomlinson* (1872), L. R. 8 Q. B. 12.

(*b*) *R. v. Luffe* (1807), 8 East, 193; *Atchley v. Sprigg* (1864), 33 L. J. Ch. 345; *Legge v. Edmonds* (1855), 25 L. J. Ch. 138; *Goodright v. Moss* (1777), 2 Cowp. 591.

(*c*) *Ante*, p. 525.

(*d*) *R. v. Reading* (1734), 2 Sess. Cas. 286; *R. v. Kea* (1809), 11 East, 132; *Goodright v. Moss*, *sup.*; yet she may prove her own adultery to fix the paternity (*R. v. Luffe*, *sup.*, at p. 203), from the necessity of the case.

(*e*) *Yates v. Chippendale* (1862), 11 C. B. N. S. 512.

The rule that non-access could only be proved by showing the husband to have been beyond the four seas during the period when the child must have been begotten is now exploded, and the rule is laid down as follows:—Where a child is born in lawful wedlock, the husband not being separated by divorce (or now by a decree of judicial separation), sexual intercourse is presumed till that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that it did not take place at any time when by the laws of nature the husband could be the father of the child. By the term “access” must be understood sexual intercourse, for otherwise a husband might be said to have access because he was in the same place with his wife, although under circumstances which tended to prove that no sexual intercourse could take place (*f*).

Access, in that sense, is to be presumed where there has been opportunity for it by personal access, though after voluntary separation; and strong evidence is requisite to show that it has not taken place (*g*): but the non-access of the husband need not be proved during the whole pregnancy, if he was absent at such a time as shows a natural impossibility that he could be the father (*h*). Absence to within six months prior to delivery was in one case deemed sufficient (*i*). Where he has access, the criminal intercourse of his wife with others will not bastardize the issue (*k*). Where a decree of judicial separation exists, obedience to it is to be presumed, and the child born of the woman divorced or separated would be presumed not to be the husband’s.

If the child is born after the husband’s death, but within the usual period of gestation (viz., nine, or even ten calendar months) (*l*), it is legitimate; if otherwise, not; but in one case

(*f*) See *per* Sir James Mansfield, C. J., in the *Banbury Peerage* case (1811), 1 Sim. & S. 153, acted on in *Morris v. Davies* (in error) (1827), 3 C. & P. 215, where the wife lived near the husband, but in admitted and habitual adultery with another.

(*g*) *R. v. Luffe* (1807), 8 East, at p. 207; *Morris v. Davies*, *ubi sup.*; *Head v. Head* (1823), 1 Turn. & Russ. 138. But evidence of the conduct of the parties and of the circumstances explanatory of it is admissible to show non-access, though the parties were living within fifteen miles of one another, as in *Morris v. Davies*; or in the same town, as in *Atchley v. Sprigg* (1864), 33 L. J. Ch. 345; and *Sibbett v. Ainsley* (1860), 3 L. T. N. S. 583; or even if the parties have met and been alone within four walls, the circumstances attending the visit are admissible to show that no connection took place: *Gurney v. Gurney* (1863), 32 L. J. Ch. 456; *Morris v. Davies*, *ubi sup.*; *Atchley v. Sprigg*, *ubi sup.*; *Bosville v. Att.-Gen.* (1887), 12 P. D. 177.

(*h*) *R. v. Luffe*, *ubi sup.*

(*i*) *Heatheote’s Divorce* (1851), 1 Macq. H. of L. 277.

(*k*) *Cope v. Cope* (1833), 1 M. & Rob. 269; *Morris v. Davies*, *sup.*; *Legge v. Edmonds* (1855), 25 L. J. Ch. at p. 135; *Atchley v. Sprigg*, *sup.* 345.

(*l*) Co. Lit. 124 b, Dr. John Hunter’s evidence, stated in Hargr. & Butler’s Co. Lit. 123 b, and the *Gardner Peerage* case, by Le Marchant.

under very exceptional circumstances a child born 276 days after possible intercourse with the husband was held illegitimate (*m*). The father or mother may be admitted to disprove his or her marriage (*n*), and the mother may prove her adultery, in order to fix the paternity of the child after proof *aliunde* of non-access (*o*). The declaration of a parent on oath, or otherwise, may, after his or her death, be adduced as evidence to disprove a marriage (*p*); but the evidence of the parent to prove non-access is rejected, and such rejection of the evidence of the mother or her husband as to non-access after marriage is on the general ground of decency, morality and policy (*q*); and, therefore, the rule prevails although at the time of the examination of the mother the husband were dead (*r*). But upon the question of the legitimacy of a child in a claim to a peerage, a deposition, made in a suit to perpetuate testimony, and deposing to non-access before marriage, was admitted as evidence that the child was a bastard (*rr*). It is also evidence to prove the time, but not the place, of birth (*s*).

The order may, it seems, include more than one bastard child, if begotten by the same father, or the same mother (*t*).

The father may be indicted for disobedience to the order just as in the case of any other legal order of justices (*u*): but as to the liability of a soldier and the enforcement of an order against him, see 44 & 45 Vict. c. 58, s. 145.

As to estreating and putting in process the recognizance to abide the order in case of default, the name of the defaulter must be placed in a list in writing, stating the nature of the offence in respect of which such person was bound, together with the residence, &c. of such person, distinguishing principal from surety, and stating the cause, if any, of such non-appearance, and whether by reason of the non-appearance the ends of justice have been frustrated or delayed, and such list must be laid by the officer of the court before the chairman or two justices or recorder before any such recognizance may be estreated, who may make such order touching the estreating or putting in process as they may deem just, and no such recognizance may be estreated without the written order of the chairman or recorder (*x*).

Estreating
recognizance
to abide order.

A *certiorari* to remove an order of bastardy was discharged, *Certiorari*.

(*m*) *Bosville v. Att.-Gen.* (1887), 12 P. D. 177.

(*n*) *R. v. Bromley* (1795), 6 T. R. 330; *St. Peter's and Old Swynford* (1734), 2 Scss. Cas. 298.

(*o*) *Legge v. Edmonds, sup.*; *Yates v. Chippendale* (1862), 11 C. B. N. S. 512.

(*p*) *Doe d. Warren v. Bray* (1828), 8 B. & C. at p. 817.

(*q*) *Goodright v. Moss* (1777), 2 Cowp. 591; *Legge v. Edmonds, sup.*; *R. v. Sourton* (1836), 5 A. & E. 180.

(*r*) *R. v. Kea* (1809), 11 East, 132.

(*rr*) *The Poulett Peerage*, [1903] A. C. 395.

(*s*) *R. v. Erith (Inh.)* (1807), 8 East, 539.

(*t*) *R. v. Skinn* (1741), 1 Bott, 6th ed. pl. 527.

(*u*) *R. v. Brisby* (1849), 18 L. J. M. C. 157; *R. v. Ferrall* (1850), 20 L. J. M. C. 39; *R. v. Robinson* (1759), 2 Burr. R. 799.

(*x*) 7 Geo. 4, c. 64, s. 31.

not having been applied for within six months (*y*). The court have power on the application for a *certiorari* to inquire into the validity of the service, as the jurisdiction of the justices only attaches on proof that the summons has been duly served (*z*). The order may now be amended after being brought up in certain cases under 12 & 13 Vict. c. 45, s. 7; see *ante*, p. 534.

Enforcing
the order.

The goods of the putative father may be distrained and sold to pay the sum ordered (*c*); or he may be committed for not more than three months (*d*); or he may be indicted for disobeying the order (*e*).

Statutory
forms of
order.

The following are the forms of the orders given by the Local Government Board:—

Form of Order when Application made by a Woman after Birth.

— } At a petty session of his Majesty's justices of the peace for the
to wit. } county (*f*) of — holden in and for the — (*f*) division of
— in the said (*f*) county, at — on the — day of — in
the year of our Lord one thousand nine hundred and — before us
— of his Majesty's justices of the peace for the said (*f*) county.

Whereas one —, single woman, residing at —, within this
— (*f*) division — did, on the — day of — in the year of
our Lord one thousand nine hundred and —, having been delivered
of a bastard child *within* twelve calendar months prior thereto, make
application to —, one of his Majesty's justices of the peace acting
for this (*f*) division, for a summons to be served upon —, of —,
whom she alleged to be the father of the said child (*g*); and the said
justice thereupon issued his summons to the said — to appear at a
petty session to be holden on this day for this (*f*) division — in which
the said justice usually acts, to answer her complaint touching the
premises:

And whereas the said —, having been duly served with the said
summons within forty days from *this day* (*h*) — (*i*), *and now appearing in pursuance thereof* —, and the said — having now applied
to us the justices in petty session assembled, for an order upon the said
—, according to the form of the statute in such case made and provided;
and it being now proved to us, *in the presence and hearing of the*

(*y*) *R. v. Howlett* (1743), 1 Wils. 35.

(*z*) *R. v. Farmer*, [1892] 1 Q. B. 637.

(*c*) 35 & 36 Vict. c. 65, s. 4.

(*d*) *Ibid.*; and *Davies v. Evans* (1882), 9 Q. B. D. 238.

(*e*) *Ante*, p. 537, note (*u*).

(*f*) Or city, borough, or other place, as the case may be.

(*g*) When the application is made after the expiration of twelve months from the birth, but the alleged father has paid money for the maintenance of the child, for the word "*within*" substitute the words "*more than*" and after the word "*child*" insert "*and who was proved before the said justice to have paid money for the maintenance of the said child within twelve calendar months after its birth.*"

(*h*) If the order be made at an adjourned session, insert the day of the commencement of the session, adding the words "*from which day the hearing of this case has been adjourned,*" and erase the words "*this day.*"

(*i*) If the defendant do not appear, insert here, "*and six days at least before this day, as is now proved before us,*" or "*the same having been left at his last place of abode six days at least before this day, as is now proved before us,*" and erase the words which follow in italics.

said (k) ———, that the said child was, on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, born a bastard of the body of the said ———; and we having, *in the presence and hearing of the said (k) ———*, heard the evidence of such woman ——— and such other evidence as she hath produced, *and having also heard all the evidence tendered by (l) ———, the said ———*, and the evidence of the said ——— the mother of the said child, having been corroborated in some material particular by other evidence to our satisfaction, do hereby *adjudge* the said ——— to be the putative father of the said bastard child; and having regard to all the circumstances of this case, we do now hereby order, that the said ——— do pay unto the said ———, the mother of the said child, so long as she shall live and shall be of sound mind, and shall not be in any gaol or prison, or under sentence of transportation, or to the person who may be appointed to have the custody of such child under the provisions of an Act passed in the eighth year of her Majesty Queen Victoria, intituled “An Act for the further amendment of the laws, relating to the poor of England,” the sum of ——— per week for the maintenance and education of the said child, until the said child shall attain the age of ——— years or shall die, and we do hereby further order the said ——— to pay to the said ——— the sum of ——— for the expenses incidental to the birth of the said child, and the sum of ——— for the costs incurred in obtaining this order.

Given under our hands and seals, at the session aforesaid ———.

If the application was made by a woman *before* the birth of the child, the statute has given the form following:—

Form of Order when Application made by a Woman with Child.

——— } At a petty session of his Majesty's justices of the peace for
to wit. } the county (m) of ———, holden in and for the ——— (m) division
of ——— in the said county (m) at ———, on the ——— day of ———,
in the year of our Lord one thousand nine hundred and ———, before
us ——— his Majesty's justices of the peace for the said (m) county.

Whereas one ———, single woman, residing at ———, within this ——— (m) division, being with child, did, on the ——— day of ——— in the year of our Lord one thousand nine hundred and ———, make application to ———, one of his Majesty's justices of the peace acting for this (m) division, for a summons to be served upon one ———, of the parish of ———, in the county (m) of ———, whom she, *being duly sworn* before the said ———, *upon her oath stated (n)* to be the father of the child with which she was then pregnant, and the said justice thereupon issued his summons to the said ——— to appear at a petty session to be holden on this day for this division (m) in which the said justice usually acts, to answer her complaint touching the premises: and whereas the said ——— hath been lately delivered of a bastard child: and whereas the said ——— having been duly served with the said summons, *and appearing in pursuance thereof (o)* ———; and the said ——— having now

(k) Should the defendant not appear, erase the words in italics.

(l) Should the defendant appear by attorney or counsel it will be then only necessary to erase the word “by” and add “on behalf of;” but should he not appear himself, or by attorney or counsel, then erase the words in italics.

(m) Or city, borough, or other place, as the case may be.

(n) Or affirmed.

(o) Insert here, if the defendant do not appear, “six days at least before this day, as is now proved before us,” or, “the same having been left at his last place of abode six days at least before this day, as is now proved before us,” and erase the words in italics.

applied to us, the justices in petty session assembled, for an order upon the said ——— according to the form of the statute in such case made and provided; and it being now proved to us, *in the presence and hearing of the said (p)* ——— that the said child was, on the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, born a bastard of the body of the said ———, and we having, *in the presence and hearing of the said (p)* ———, heard the evidence of such woman ——— and such other evidence as she hath produced, *and having also heard all the evidence tendered by (q)* ——— the said ———, and the evidence of the said ———, the mother of the said child, having been corroborated in some material particular by other evidence to our satisfaction, do hereby adjudge the said ——— to be the putative father of the said bastard child; and having regard to all the circumstances of this case, we do now hereby order, that the said ——— do pay unto the said ———, the mother of the said bastard child, so long as she shall live and shall be of sound mind, and shall not be in any gaol or prison, or under sentence of transportation, or to the person who may be appointed to have the custody of such child under the provisions of an Act passed in the eighth year of her Majesty Queen Victoria, intituled “An Act for the further amendment of the Laws relating to the Poor in England,” *the sum of ——— per week* for the maintenance and education of the said child *(r)* until the said child shall attain the age of ——— years, or shall die, and we do hereby further order the said ——— to pay to the said ——— the sum of ——— for the expenses incidental to the birth of the said child, and the sum of ——— for the costs incurred in obtaining this order.

Given under our hands and seals at the session aforesaid ———.

Copy of Indictment for disobeying an Order of Justices.

Sussex } The jurors of our lord the King upon their oath present that
to wit. } S. H., now residing in the parish of D., within the division of L.,
in the county of Sussex, single woman, before the making of the order of
justices hereinafter mentioned, to wit, on the second day of June, in the
year of our Lord ———, at M., within the said county, was delivered of a
bastard child; and the jurors aforesaid, upon their oath aforesaid, do further
present that the said S. H., having been so delivered of such bastard
child, and having come to reside within the parish of D. aforesaid, and
within the said division and county, afterwards, to wit, on the twenty-
ninth day of April, in the year of our Lord ——— (being within twelve
calendar months after the birth of the said child), did make application to
J. L. E., esquire, one of his Majesty's justices of the peace, acting in and
for the said division and county at P., in the said division and county, for
a summons to be served upon one W. B. of H., in the county of Surrey,
grocer, whom she alleged and still doth allege to be the father of the
said child; and the jurors aforesaid, upon their oath aforesaid, do
further present that the said J. L. E., so being such justice acting in
and for the said division and county as aforesaid, did thereupon, after-
wards, to wit, on the same day and year last aforesaid, at P. aforesaid,
duly issue his summons to the said W. B., to be and appear at a petty
sessions to be holden for the said division at P. aforesaid, within the
said division and county, on the sixth day of May next, to answer the
complaint of her the said S. H. touching the premises; and the jurors
aforesaid, upon their oath aforesaid, do further present that the said

(p) Should the defendant not appear, erase the words in italics.

(q) Should the defendant appear by attorney or counsel, it will be then only necessary to erase the word “by” and add “on behalf of,” but should he not appear himself, or by attorney or counsel, then erase the words in italics.

(r) Not to exceed two shillings and sixpence.

W. B. was duly served with the said summons within forty days of and more than six days before the holding of the said petty sessions, and the making of the order hereinafter mentioned, to wit, on the twenty-ninth day of April, —, to which said summons he, the said W. B., notwithstanding such service thereof aforesaid did not then, to wit, at the said petty sessions so holden for the said division, on the said sixth day of May, appear or offer any defence, nor show cause why an order of maintenance should not be made upon him, whereupon J. N. esquire, and the said J. L. E., esquire, being two of his Majesty's justices of the peace acting in and for the said division and county in petty session assembled, at the said petty session holden for the said division at P., within the said division and county, on the said sixth day of May, —, the said S. H. having then, to wit, at the said petty sessions, applied to them the said J. N. and J. L. E., as such justices aforesaid, for an order upon the said W. B., according to the form of the statute in such case made and provided, did by their order in writing, under their hands and seals, bearing date the sixth day of May, in the year of our Lord —, after having heard such evidence as the said S. H. had produced; and the evidence of the said S. H., mother of the said child, having been corroborated in some material particular by other testimony to the satisfaction of the said justices, declare and adjudge the said W. B. to be the putative father of the said bastard child, and did thereby order that the said W. B. should pay to the said S. H., the mother of the said bastard child, so long as she should live and be of sound mind, and should not be in any gaol or prison or under sentence of transportation, or to the person who should be appointed to have the custody of the said bastard child, under the provisions of the said statute, the sum of — shillings per week from the said twenty-ninth day of April last, until the said child should attain the age of thirteen years or should die, or the said S. H. should marry, for and towards the relief and keeping of the said bastard child; and the said justices did thereby further order that the said W. B. should pay to the said S. H. the sum of £—, being the costs incurred in obtaining the said order. And the jurors aforesaid, upon their oath aforesaid, do further present that after the making the said order and before taking of this inquisition, to wit, on the fifteenth day of May, in the year —, at H. aforesaid, notice of the aforesaid order was duly given to him the said W. B., and that he the said W. B. was duly made acquainted with the contents thereof, by being personally served with the said order; and the jurors aforesaid, upon their oath aforesaid, do further present that the said S. H. is still living unmarried and never having been married, and is of sound mind, and is not and has not been, since the making of the said order, in any gaol or prison or under sentence of transportation, and from the time of making of the said order hitherto has been and still has, as the proper person in that behalf, none other having been appointed, the sole care and custody of the said bastard child. And the jurors aforesaid, upon their oath aforesaid, do further present that the said bastard child is yet living, and is under the age of thirteen years, to wit, of the age of sixteen months only or thereabout, and hath always from the time of making the said order, until the day of taking this inquisition, been and continued and now is chargeable to and entirely supported by the said S. H., the mother. And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. B. not regarding the said order, nor the laws and statutes in such case made and provided, hath not upon notice of the said order aforesaid, at any time or times since the making thereof as aforesaid, hitherto paid or caused to be paid to the said S. H., or any person on her behalf, the said sum of — shillings per week from the said twenty-ninth day of April last aforesaid, nor any part thereof; nor the sum of £—, being the costs of obtaining the said order as aforesaid nor any part thereof, but on the contrary thereof, notwithstanding such notice aforesaid, he the said W. B., on and from the said sixth day of May, in the said year of our Lord —, unto the taking of this inquisition, unlawfully, wilfully, obstinately and contemptuously hath

neglected and refused, and still doth neglect and refuse, to pay or cause to be paid to the said S. H. the said sum of — shillings weekly, from the said twenty-ninth day of April, —, or any part thereof; and also the said sum of £—, the costs incurred in obtaining the said order as aforesaid, or any part thereof, contrary to the direction of the said order, and in manifest breach and contempt of the same, to the great damage of the said S. H., to the evil and pernicious example to all others in the like case offending, and against the peace of our said lord the King, his crown and dignity.

Second count: And the jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on the sixth day of May, A.D. —, J. N. and J. L. E., esquires, two of his Majesty's justices of the peace, acting in and for the division of L., in the county of Sussex, in petty sessions assembled, at the petty sessions holden for the said division and county, at P. within the said division and county, on the sixth day of May, A.D. —, duly made their order in writing, under their hands and seals, bearing date the said sixth day of May, —, which said order was and is in the words and figures following, that is to say:—

“Sussex to wit. At a petty sessions of his Majesty's justices of the peace for the county of Sussex, holden in and for the division of L. in the said county, at the town hall in P., on the sixth day of May, in the year of our Lord one thousand nine hundred and —, before us, J. N. and J. L. E., esquires, two of his Majesty's justices of the peace for the said county: Whereas one S. A., single woman, residing at D., within this division, did on the twenty-ninth day of April, in the year of our Lord one thousand nine hundred and —, having been delivered of a bastard child, within twelve calendar months prior thereto, make application to J. L. E., esquire, one of his Majesty's justices of the peace, acting for this division, for a summons to be served upon W. B., of H., in the county of Surrey, grocer, whom she alleged to be the father of the said child, and the said justice thereupon issued his summons to the said W. B., to appear at a petty sessions to be holden on this day for this division, in which the said justice usually acts, to answer her complaint touching the premises. And whereas the said W. B. having been duly served with the said summons within forty days from this day, and six days at least before this day, as is now proved before us, and the said S. H. having now applied to us, the justices in petty session assembled, for an order upon the said W. B. according to the form of the statute in such case made and provided; and it being now proved to us that the said child was, since the passing of an Act passed in the eighth year of the reign of her late Majesty, intituled ‘An Act for the further amendment of the Laws relating to the Poor in England,’ that is to say, on the second day of June, in the year of our Lord one thousand eight hundred and seventy-three, born a bastard of the body of the said S. H., and we have heard the evidence of such woman, and such other evidence as she hath produced, and the evidence of the said S. H., the mother of the said child, having been corroborated in some material particular by other testimony to our satisfaction, do hereby adjudge the said W. B. to be the putative father of the said bastard child, and having regard to all the circumstances of this case, we do now hereby order that the said W. B. do pay unto the said S. H., the mother of the said bastard child, so long as she shall live and shall be of sound mind, and shall not be in any gaol or prison, or under sentence of transportation, or to the person who may be appointed to have the custody of such bastard child, under the provisions of the said statute, the sum of — shillings per week from the said twenty-ninth day of April last until the said child shall attain the age of thirteen years or shall die, or the said S. H. shall marry. And we do hereby further order the said W. B. to pay to the said S. H. the sum of —, being the costs incurred in obtaining this order. Given under our hands and seals at the sessions aforesaid.

J. N. (L.S.) J. L. E. (L.S.)”

And the jurors aforesaid, upon their oath aforesaid, do further present that the said W. B. was personally served with the said order after the making thereof, and before the taking of this inquisition, to wit, on the fifteenth day of May, ——— : and the jurors aforesaid, upon their oath aforesaid, do further present that the said S. H. is still living, without having been married, and is of sound mind, and is not nor hath been in any gaol or prison since the making of the said order, nor under any sentence of transportation, and from the time of the making the said order hitherto has had and still has the sole care and custody of the said bastard child, no other person having at any time been appointed in that behalf; and the jurors aforesaid, upon their oath aforesaid, do further present that the said bastard child is still living and under the age of thirteen years, to wit, of the age of sixteen months or thereabouts, and hath always, from the time of making the said order until the day of taking of this inquisition been and continued, and still is chargeable to and entirely supported by the said S. H., the mother; and the jurors aforesaid, upon their oath aforesaid, do further present that the said W. B. not regarding the said order, nor the laws and statutes in such case made and provided, hath not, upon notice of the said order as aforesaid, at any time or times since the making thereof, as aforesaid, hitherto paid or caused to be paid to the said S. H., or any person on her behalf, the said sum of ——— shillings per week, from the twenty-ninth day of April last aforesaid, nor any part thereof, nor the sum of ———, being the costs of obtaining the said order as aforesaid, nor any part thereof, but on the contrary thereof, notwithstanding notice thereof as aforesaid, he, the said W. B., from the said sixth day of May, in the year ———, to the day of the taking of this inquisition, unlawfully, wilfully, obstinately and contemptuously hath neglected and refused, and still doth neglect and refuse, to pay the said sum of ——— shillings weekly, from the said twenty-ninth day of April, ———, or any part thereof, and also the said sum of ———, the costs incurred in obtaining the said order as aforesaid, or any part thereof, contrary to the direction of the said order, and in manifest breach and contempt of the same, to the great damage of the said S. H., to the evil and pernicious example of all others in the like case offending, and against the peace of our lord the King, his crown and dignity.

Form of Notice of Appeal.

To ——— and ———, esquires, two of his Majesty's justices of the peace for the county of ———, acting in and for the ——— petty sessional division of the said county, and to Mr. ———, their clerk, and to ———, of ———.

Take notice that ———, of ———, intends to enter and prosecute an appeal at the next quarter sessions of the peace, to be holden at ———, in and for the county of ———, against a certain order in bastardy bearing date on or about the ——— day of ———, wherein he was adjudged to be the putative father of a certain bastard child of you, the said ———, and was ordered to contribute towards the relief of the said bastard child as in the order mentioned. And further take notice that the grounds of the said appeal are as follows:—

1. That the said ——— is not the father or the putative father of the said bastard child.
2. That there was not nor is not any or any sufficient corroboration of the evidence of the said ———.
3. That the said order was unjust and contrary to the evidence, and could not be supported either in law or in fact.
4. That the said order is bad upon the face of it.

[Add other grounds of appeal which may have arisen in the course of the case, *e.g.*, the wrongful exclusion by the justices of evidence material to the case of the putative father.]

CHAPTER III.

OF HIGHWAYS.

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SECTION 1.

PROCEEDINGS FOR DIVERTING OR STOPPING HIGHWAYS UNDER 5 & 6 WILL. 4, c. 50, OR FOR DIRECTING THAT HIGHWAYS SHALL CEASE TO BE REPAIRABLE UNDER 27 & 28 VICT. c. 101, AND APPEALS AGAINST THEM.

Commence-
ment of pro-
ceedings for
diverting or
stopping up
highways.

THE subject of stopping and diverting highways, with the right of appeal against orders of justices for so doing, was regulated by 13 Geo. 3, c. 78, until the 55 Geo. 3, c. 68, was substituted for it. Both Acts are now repealed by 5 & 6 Will. 4, c. 50, s. 1, and a new system is introduced, under which two justices, on application of a surveyor of highways acting either on behalf of the public, or at the instigation of a private person, may view the existing highways, and after giving certain notices, may certify that such view has been had; which certificate, being lodged with the clerk of the peace, together with the plan, &c. pointed out by the Act, and the consent of the owner of any land taken for the new road, shall be read in open court at the quarter sessions held next after four weeks from the day of lodging the justices' certificate, and enrolled among the records of the quarter sessions. An appeal is given, and a jury of twelve disinterested men out of the panel returned to serve at the sessions is to determine whether the new highway is nearer and more commodious to the public, or whether the old one is unnecessary, or the appellant is injured or aggrieved. The powers formerly held by the surveyor of highways are now, by 38 & 39 Vict. c. 55 (Public Health Act, 1875), s. 144, in urban districts vested in the urban authority, and in rural districts by 56 & 57 Vict. c. 73 (Local Government Act, 1894), s. 25, in the rural district council.

By 5 & 6 Will. 4, c. 50, s. 84, it is enacted, that when the inhabitants in vestry assembled shall deem it expedient that any highway should be stopped up, diverted, or turned, either entirely, or reserving a bridleway or footway along the whole or any part or parts thereof, the chairman of such meeting shall, by an order in writing, direct the surveyor to apply to two justices to view the same, and shall authorize him to pay all the expenses (a) attending such view, and the stopping up, diverting, or turning such highway, either entirely or subject to such reservation as aforesaid, out of the money received by him for the purposes of this Act.

Application to justices by vestry or private person in order to stopping highway.

Provided nevertheless, that if any other party shall be desirous of stopping up, diverting, or turning any highway as aforesaid, he shall, by a notice in writing, require the surveyor to give notice to the churchwardens to assemble the inhabitants in vestry, and to submit to them the wish of such person; and if such inhabitants shall agree to the proposal, the said surveyor shall apply to the justices as last aforesaid, for the purposes aforesaid; and in such case, the expenses aforesaid shall be paid to such surveyor by the said party, or be recoverable in the same manner as any forfeiture is recoverable under this Act: and the said surveyor is hereby required to make such application as aforesaid.

When it shall appear (b) upon such view of such two justices of the peace, made at the request of the said surveyor as aforesaid, that any public highway may be diverted and turned, either entirely, or subject as aforesaid (viz., sect. 84), so as to make the same nearer or more commodious to the public, and the owner of the lands or grounds through which such new highway so proposed to be made shall consent thereto, by writing under his hand, or if it shall appear upon such view that any public highway is unnecessary, the said justices shall direct the surveyor to fix a notice in the form or to the effect of schedule (No. 19) to this Act annexed (c) in legible characters, at the place and by the side of each end of

View of highway by justices—
Notices of diverting or stopping it—
Certificate of justices, with plan of highway.

(a) The surveyor to the authority should take all steps required by sects. 84 and 85. The charges of a solicitor to the authority for such work are not "expenses" under sect. 84 so as to be recoverable under sect. 101: *United Land Co. v. Tottenham Local Board* (1884), 13 Q. B. D. 640.

(b) 5 & 6 Will. 4, c. 50, s. 85.

(c) Viz., as follows:—Notice is hereby given, that on the ——— day of ——— next, application will be made to his Majesty's justices of the peace assembled at quarter sessions in and for the county of ——— at ——— for an order for [if the order be for turning, diverting, and stopping up, &c., here state it, and describe the road ordered to be turned, diverted, and stopped up; if the order be for stopping up a useless road, here state it, and describe the road ordered to be stopped up], and that the certificate of two justices having viewed the same, &c., with the plan of the old and proposed new highway, will be lodged with the clerk of the peace for the said county on the ——— day of ——— next.

A. B., Surveyor [or Surveyors].

C. D., ——— of the parish of ———.

the said highway (*d*) from whence the same is proposed to be turned, diverted, or stopped up, either entirely or subject as aforesaid, and also to insert the same notice in one newspaper published or generally circulated in the county where the highway so proposed to be diverted and turned, or stopped up, either entirely or subject as aforesaid (as the case may be), shall lie, for four successive weeks next after the said justices have viewed such public highway, and to affix a like notice on the door of the church of every parish in which such highway so proposed to be diverted, turned, or stopped up, either entirely or subject as aforesaid, or any part thereof, shall lie, on four successive Sundays next after the making such view: and the said several notices having been so published, and proof thereof having been given to the satisfaction of the said justices, and a plan having been delivered to them at the same time, particularly describing the old and the proposed new highway, by metes, bounds, and admeasurements thereof, which plan shall be verified by some competent surveyor, the said justices shall proceed to certify under their hands the fact of their having viewed the highway as aforesaid, and that the proposed new highway is nearer or more commodious to the public, and if nearer, the said certificate shall state the number of yards and feet it is nearer; or if more commodious, the reasons why it is so; and if the highway is proposed to be stopped up as unnecessary, either entirely or subject as aforesaid, then the certificate shall state the reason why it is unnecessary.

As to what
new highway
may be.

The new highway need not be an entirely new road, but may consist of land thrown into and added to so as to widen or make of uniform width an old passage or right of way, if it is made for the purpose of being in lieu of, and in substitution of, another highway, so as to justify the inhabitants of the parish in assenting to the stopping of it up (*e*).

The notices must be stated to have been placed at each end of the road (*f*).

Contents of
certificate.

It is sufficient for the certificate to state that the new road will be more commodious, and need not say that it is so (*g*); but they cannot certify on the ground that it will be shorter than the existing road when the latter shall have been altered pursuant to the powers given by a local Act (*h*).

The certificate is sufficient if it state the existence of the circumstances required by sect. 85; it is unnecessary to state that the preliminaries enacted by sect. 84 have been complied

(*d*) *R. v. Justices of Surrey*, [1892] 1 Q. B. 867.

(*e*) *R. v. Phillips* (1866), L. R. 1 Q. B. 648.

(*f*) *R. v. Justices of Surrey* (1870), L. R. 5 Q. B. 466; *R. v. Justices of Surrey* (1892), *sup.*

(*g*) *R. v. Phillips*, *ubi sup.*

(*h*) *R. v. Local Board of Midgley* (1864), 33 L. J. M. C. 188.

with (i); but the highway must be one over which the justices have jurisdiction, and the vestry of inhabitants the proper vestry (k).

The certificate is sufficient if it certify that the new highway is one of the two, *i.e.*, either nearer or more commodious, and need not state that it is both (l).

And (m) the certificate of the said justices, together with the proof and plan so laid before them as aforesaid, shall, as soon as conveniently may be after the making of the said certificate, be lodged with (n) the clerk of the peace for the county in which the said highway is situated, and shall (at the quarter sessions which shall be holden for the limit within which the highway so diverted and turned or stopped up, either entirely or subject as aforesaid, shall lie, next after the expiration of four weeks from the day of the said certificate of the said justices having been lodged with the clerk of the peace as aforesaid) be read by the said clerk of the peace in open court, and the said certificate, together with the proof and plan as aforesaid, as well as the consent in writing of the owner of the land through which the new highway is proposed to be made, shall be enrolled (o) by the clerk of the peace amongst the records of the said court of quarter sessions: provided always, that any person whatever shall be at liberty at any time previous to the said quarter sessions to inspect the said certificate and plan so as aforesaid lodged with the said clerk of the peace, and to have a copy thereof, on payment to the clerk of the peace at the rate of sixpence per folio, and a reasonable compensation for the copy of the plan.

When a county is divided into distinct divisions, and a distinct court is held in each division, by adjournment from one to the other, and the rules of practice made by the court in each division assume that the day when the court for that division begins its sittings is the first day of the sessions, it has been held that notice given for the adjourned court for the division in which an appeal is according to the practice to be tried, is good (oo), and it is presumed that the same ruling applies to the subject now under discussion.

It is the duty of sessions, as well when there is no appeal as where there is one, to be satisfied that the certificate comes before them correct on its face, and accompanied by plan and proof such as the statute requires. And if there are apparent defects on its face, the court must determine whether they are merely formal or substantial, and if sub-

(i) *R. v. Harvey* (1874), L. R. 10 Q. B. 46, overruling *R. v. Justices of Worcestershire* (1851), 23 L. J. M. C. 113.

(k) *Wright v. Overseers of Frant* (1863), 32 L. J. M. C. 204.

(l) *R. v. Phillips* (1866), L. R. 1 Q. B. 648.

(m) Sect. 85, continued.

(n) *Sec De Ponthieu v. Pennyfeather* (1814), 5 Taunt. 634.

(o) *Ibid.*

(oo) *R. v. Justices of Sussex* (1865), 34 L. J. M. C. 69.

stantial they should refuse to confirm it. The certificate must be supposed to contain the mind of the two viewing justices who have framed it, so that if it omits to state any substantial matter on which the statute requires them to express a judgment, the quarter sessions, whose whole jurisdiction depends upon the certificate, cannot know that they have ever considered it, or if they have, that in the order which they shall make they will be carrying out what it was intended to recommend (*p*). Where the highway is in a rural parish the consent of the parish council or meeting and district council must be proved, and also the confirmation of such consent (*q*). The order of quarter sessions is bad if it delegate to the surveyor a discretion as to the line of the new highway to be made (*r*).

Including
different
highways
in one order
or certificate.

And it is provided, that in any case where it is proposed to stop up or divert more than one highway, which highways shall be deemed to be so connected together, as that they cannot be separately stopped or diverted without interfering one with the other, it shall be lawful to include such different highways in one order or certificate (*s*).

And it is further provided, that in the event of any appeal being brought against the whole, or any part or parts of any order or certificate for diverting more highways than one, it shall be lawful for the court to decide upon the propriety of confirming the whole, or any part or parts of such order or certificate, without prejudice to the remaining part or parts thereof (*t*).

Persons
aggrieved by
diverting or
stopping
highways to
appeal to
quarter ses-
sions, on
giving four-
teen days'
notice of
appeal, with
statement of
grounds
thereof.

And it is further provided (*u*), that when any such certificate shall have been so given as aforesaid, it shall and may be lawful for any person who may think that he would be injured or aggrieved if any such highway should be ordered to be diverted and turned, or stopped up, either entirely or subject as aforesaid, and such new highway set out and appropriated in lieu thereof as aforesaid, or if any unnecessary highway should be ordered to be stopped as aforesaid, to make his complaint thereof, by appeal to the justices of the peace at the said quarter sessions, upon giving to the surveyor fourteen (*x*) days' notice in writing of such appeal, together with a statement in writing of the grounds of such appeal, who is hereby required within forty-eight hours after the receipt of such notice to deliver a copy of the same to the

(*p*) *R. v. Justices of Worcestershire* (1854), 23 L. J. M. C. 113; *R. v. Harvey* (1874). L. R. 10 Q. B. 46.

(*q*) 56 & 57 Vict. c. 73, ss. 13 (1), 19 (8).

(*r*) *R. v. Newmarket Rail. Co.* (1850), 19 L. J. M. C. 241.

(*s*) 5 & 6 Will. 4. c. 50, s. 86; see *R. v. Milverton* (1836), 5 A. & E. 841.

(*t*) 5 & 6 Will. 4, c. 50, s. 87.

(*u*) *Ibid.* s. 88.

(*x*) 12 & 13 Vict. c. 45, s. 1, *ante*, p. 439; *R. v. Maule* (1871), 41 L. J. M. C. 47.

party by whom he was required to apply to the justices to view the said highway: provided, that in all cases where the said surveyor shall have been directed by the inhabitants in vestry assembled to apply to such justices as aforesaid, then the said surveyor shall not be required to deliver a copy of such notice to any party; provided also, that it shall not be lawful for the appellant to be heard in support of such appeal unless such notice and statement shall have been so given as aforesaid, nor on the hearing of such appeal to go into or give evidence of any other grounds of appeal than those set forth in such statement as aforesaid.

A notice of appeal against the stopping up of a specified part of the road is good (*y*). And (*z*) in case of such appeal, the justices of the said quarter sessions shall, for the purpose of determining whether the proposed new highway is nearer (*a*) or more commodious to the public, or whether the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or whether the said party appealing would be injured or aggrieved, impanel a Impannelling jury. jury of twelve disinterested men out of the persons returned to serve as jurymen at such quarter sessions; and if after hearing the evidence produced before them, the said jury shall return a verdict, that the proposed new highway is nearer or more commodious to the public, or that the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, or that the party appealing would not be injured or aggrieved, then the said court of quarter sessions shall dismiss such appeal and make the order herein mentioned for diverting and turning and stopping up such highway, either entirely or subject as aforesaid, or for diverting, turning and stopping up of such old highway, and purchasing the ground and soil for such new highway, or for stopping up such unnecessary highway, either entirely or subject as aforesaid; but if the said jury shall return a verdict, that the proposed new highway is not nearer or not more commodious to the public, or that the highway so intended to be stopped up, either entirely or subject as aforesaid, is not unnecessary, or that the party appealing would be injured or aggrieved, then the court of quarter sessions shall allow such appeal, and shall not make such order as aforesaid.

This clause means that, according to the allegations in the certificate of the justices, the jury are to find the one way or the other. If the justices certify that the proposed new highway is nearer, the jury are to find whether it is nearer; but if the justices do not find that it is nearer, but that it is more

(*y*) *R. v. Justices of Huntingdonshire* (1865), L. R. 1 Q. B. 36. Where the highway is within the highway district, see *post*.

(*z*) 5 & 6 Will. 4, c. 50, s. 80.

(*a*) *R. v. Phillips* (1866), L. R. 1 Q. B. 648.

Costs of
appeal.

commodious, then the jury are to find whether it is more commodious or not. If the justices do not find both, they are to find one or the other (*b*).

And (*c*) the court of quarter sessions is hereby authorized and required to award to the party giving or receiving notice of appeal, such costs and expenses as shall be incurred in prosecuting or resisting such appeal, whether the same shall be tried or not; and such costs and expenses shall be paid by the surveyor or other party as aforesaid, at whose instance the notice for diverting and turning or stopping up the highway, either entirely or subject as aforesaid, shall have been given; and in case the said surveyor or other party as aforesaid shall not appear in support thereof, the said court of quarter sessions shall award the costs of the appellant to be paid by such surveyor or other party as aforesaid; and such costs shall be recoverable in the same manner as any penalties or forfeitures are recoverable under this Act. The costs of the appeal are now regulated by the Quarter Sessions Act (12 & 13 Vict. c. 45, s. 5), by which the court may direct the party against whom the appeal shall be decided to pay such costs as to the court appear reasonable. Such costs are recoverable, on the certificate of the clerk of the peace that they have not been paid, under a justice's distress warrant (11 & 12 Vict. c. 43, s. 27), or the order may be removed into the King's Bench Division and made a rule of court (*d*).

The court may order an appellant to pay the costs occasioned by his notice of appeal, although he has not entered or has not prosecuted the appeal (*e*), or the costs occasioned by any frivolous grounds of appeal (*f*).

The sessions are bound to give costs in a case within this 90th section, and if they refuse the court will grant a mandamus to them to enter continuances and make the order; and it is no answer to an application for such costs at the sessions that earlier in the day of the application the appeal was called on and neither party appearing it had been struck out, for the appellant was not bound to apply immediately for the costs, but is in time if he come at any time on the same day (*g*).

The non-payment of costs awarded by an order of the court under 5 & 6 Will. 4, c. 50, s. 90, is not an offence against the Act for which a person can be convicted under sect. 101, but such costs may be recovered summarily. The distress warrant will be bad if it does not show on the face of it an order of session for the payment of a specific sum as costs, for the court

(*b*) *R. v. Phillips* (1866), L. R. 1 Q. B. 648.

(*c*) 5 & 6 Will. 4, c. 50, s. 90.

(*d*) 12 & 13 Vict. c. 45, s. 18; *R. v. Huntley* (1854), 23 L. J. M. C. 106.

(*e*) 12 & 13 Vict. c. 45, s. 6.

(*f*) *Ibid.* s. 4.

(*g*) *R. v. Justices of West Riding* (1862), 31 L. J. M. C. 271.

cannot award costs generally in the words of the Act (*h*). Therefore the amount of costs should be ascertained by the sessions and inserted in the order of the court (*i*).

Proviso (*k*), that if no such appeal be made, or being made shall be dismissed as aforesaid, then the justices at the said quarter sessions shall make an order to divert and turn, and to stop up such highway, either entirely or subject as aforesaid, or to divert, turn and stop up such old highway, and to purchase the ground and soil for such new highway, or to stop up such unnecessary highway, either entirely or subject as aforesaid, by such ways and means, and subject to such exceptions and conditions in all respects as in this Act is mentioned, in regard to highways to be widened; and the proceedings thereupon shall be binding and conclusive on all persons whomsoever; and the new highway so to be appropriated and set out shall be, and for ever after continue, a public highway to all intents and purposes whatsoever; but no old highway (except in the case of stopping up of such useless highway as herein is mentioned) shall be stopped until such new highway shall be completed and put into good condition and repair, and so certified by two justices of the peace upon view thereof, which certificate shall be returned to the clerk of the peace, and by him enrolled amongst the records of the court of quarter sessions next after such order as aforesaid shall have been made, pursuant to the directions hereinbefore contained.

Proceedings
on dismissal
of appeal.

Proviso (*l*), that in every case in which a highway shall have been turned or diverted, under the provisions of this Act, the parish or other party, which was liable to the repair of the old highway, shall be liable to the repair of the new highway, without any reference whatever to its parochial locality.

No order made, or any other matter or thing done, or transacted in, or relative to, the execution of this Act, shall be vacated or quashed for want of form, or be removed by *certiorari* or other process, to any court of record at Westminster (*m*). But in cases of appeals (*n*), the quarter sessions may, if they think fit, state the facts specially for the determination of the King's Bench thereon. Such case must now be filed at the Crown Office Department within six months from the making of the order by sessions; if later, leave of the court must be obtained. (C. O. R. 1886, r. 34.) A writ of *certiorari* is not now required to remove the case. (Summary

Certiorari
taken away.

(*h*) *Sellwood v. Mount* (1841), 10 L. J. M. C. 121; *R. v. Clark* (1844), 13 L. J. M. C. 91.

(*i*) *Ex parte Holloway* (1831), 1 Dowl. P. C. 26; and 11 & 12 Vict. c. 43, s. 27.

(*k*) 5 & 6 Will. 4, c. 50, s. 91.

(*l*) *Ibid.* s. 92.

(*m*) *Ibid.* s. 107.

(*n*) *Ibid.* s. 108; see *R. v. Shiles* (1841), 1 Q. B. 919.

Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 40; and see *ante*, p. 484.) An indictment for not repairing a highway may be removed from sessions by *certiorari*: see *post*.

Justices upon their view may order highways to be widened, and in case of difference with the owners, &c. of property required to be taken, compensation is to be assessed at quarter sessions by a jury (*o*).

5 & 6 Will. 4,
c. 50, applied
to highway
about to be
paved under
local Acts.

All the provisions of 5 & 6 Will. 4, c. 50, for widening, diverting and stopping up highways, shall be applicable to all highways which now are, or may hereafter be, paved, repaired or cleansed under or by virtue of any local or personal Act or Acts of Parliament, or which may be situate within the limits of any such Act or Acts, except highways which any railway company, or the owners, conservators, commissioners, trustees or undertakers of any canal, river or inland navigation are liable by virtue of any Act of Parliament relating to such railway, canal, river or inland navigation to make, maintain, repair or cleanse (*p*).

SECTION 2.

PROCEEDINGS BEFORE JUSTICES WHERE HIGHWAY OUT OF REPAIR, AND APPEALS FROM THEM.

As to sur-
veyors.

The jurisdiction of justices to enforce repairs of highways is contained in sects. 94 and 95 of the Highway Act, 1835 (5 & 6 Will. 4, c. 50). The provisions therein contained are re-enacted by the Highway Act of 1862 (25 & 26 Vict. c. 61), ss. 18, 19, and the provisions of the latter Act supersede the former so far as concerns highways under the jurisdiction of highway boards formed under that Act, or of rural district councils having the powers of such boards. An alternative procedure is given by the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), s. 10, by complaint to the county authority. But a third alternative procedure—and the one now most commonly employed—is given by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 16; under the provisions of which Act complaint of non-repair of roads may be made to the county council, and the council may, after inquiry held, take over the duties and powers of the district council in the matter. The powers of the justices, however, are not superseded by these alternative procedures, and such powers are, therefore, now set forth.

(*o*) 5 & 6 Will. 4, c. 50, ss. 82, 83.

(*p*) 25 & 26 Vict. c. 61, s. 44.

The Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 94, enacts, if a highway is out of repair, and information thereof on oath of one credible witness is given to a justice, he is required to issue a summons to the surveyor of the parish, or other person or body politic or corporate, chargeable with such repairs, to appear before the justices at some special sessions for the highways, in the summons mentioned to be held within the division in which the highway is situate—and the said justices shall either appoint a competent person to view it, and report thereon to them at special sessions at a fixed day and place at which such surveyor or other party shall be directed to attend, or the justices shall fix a day whereon they or two of them will view the highway, and if it appears to them at the special sessions, on the day, and at the place fixed, either on the report of the viewer, or on their own view, that the highway is not in thorough and effectual repair, they shall convict the surveyor, &c. in a penalty not exceeding 5*l.*, and shall make an order on him or them to repair the same, limiting a time; and if the repairs are not effectually made within that time, the surveyor, &c. shall pay to some person to be named in a second order a sum to be therein stated, and equal in amount to the sum which the said justices shall, on the evidence produced before them, judge requisite for repairing such highway, to be recoverable in the same manner as any forfeiture is recoverable under the Act, and such money when recovered shall be applied to the repair of the highway, and in case more parties than one are bound to repair it, the order shall direct what proportion each party shall pay.

Proceedings at special sessions if parish highway out of repair.

The case of turnpike roads was also specially provided for by sect. 94.

The liabilities of the surveyor of the parish attach now to the highway board.

Before the passing of the Highway Act, 1835, much inconvenience and litigation had resulted from the boundary line of two parishes or townships running along the centre or *medium filum* of a highway, the general consequence of such a state of facts being that neither parish repaired their side in an adequate manner(s); accordingly, sect. 58 of that Act after reciting that whereas it frequently happens that the boundaries of parishes pass across or through the middle of a common highway, and one side of such highway is situated in one parish and the other side in another parish, whereby great inconveniences often arise in repairing the same, enacts, that the justices at a special sessions for the highways, on complaint of any surveyor of any parish, (stating in writing and on a plan thereunto annexed, that there is such a highway, one

Boundaries of parishes passing across or through the middle of a highway.

When boundaries of parishes pass along a highway.

(s) And see *R. v. St. Pancras* (1794), Peake's N. P. C. 220; *R. v. Eardisland* (1810), 2 Camp. 494.

side whereof ought to be repaired by one parish, and the other side by another, and particularly describing the same by metes, bounds and admeasurements thereof,) may issue their summons, with a copy of such writing and plan thereunto annexed, to the surveyor of such other parish, to appear before them on a day mentioned in such summons. If the parties appear, the justices may proceed finally to decide the matter in manner herein mentioned, in case all the parties consent thereto; but in case the surveyor summoned shall not appear on such first summons, or appearing, shall require further time, the justices must adjourn the further consideration of the matter for not more than twenty-one nor less than fourteen days from the date of such adjournment, of which such surveyor shall have notice, on which day the said justices shall proceed to hear the parties and their witnesses, and whether the party summoned does or does not appear, shall proceed to examine and shall finally determine the matter in form following: by dividing the whole of such common highway by a transverse line crossing such highway into equal parts, or into such unequal parts and proportions as in consideration of the soil, waters, floods, and inequality of such highway, or any other circumstances attending the same, they in their discretion shall think just and right, and to declare, adjudge, and order that the whole of such highway, on both sides thereof in any of such parts, shall be maintained and repaired by one of such parishes, and that the whole thereof on both sides in the other of such parts shall be maintained and repaired by the other of such parishes, and shall cause such their order, and a plan of such highway, and the allotment thereof as before mentioned, to be fairly delineated on paper or parchment, and filed with the clerk of the peace of the county in which such highway shall happen to lie, and shall also cause such posts, stones, or other boundaries to be placed and set up in such highway as in their judgment shall be necessary for ascertaining the division and allotment thereof: provided nevertheless, that in case of any such last-mentioned highway, the repair of any part of which belongs to any body politic or corporate, or to any person by the reason of tenure of any lands or otherwise howsoever, the same proceedings may be adopted, but the said body politic or corporate, or person, or some one on their behalf, may appear before such justices and object to such last-mentioned proceedings; in which case the said justices shall, before they divide such highway as aforesaid, hear and consider the objection so made, and determine the same.

This section only operates when the road is on the boundary line of two parishes or townships (*t*).

(*t*) *R. v. Perkins* (1849), 19 L. J. M. C. 105.

Special sessions are not now necessary, the justices may exercise their jurisdiction at any petty sessions (*u*).

After filing such order and plan with the clerk of the peace, such parishes, &c. shall be bound as of common right to keep in repair those parts of the highway which are allotted to them, and shall be discharged from the repair of any other part not included in such allotment (*x*).

If on the hearing of any such summons respecting the repair of any highway, the duty or obligation of such repairs is denied by the surveyor on behalf of the inhabitants of the parish, or by any other party charged therewith, it shall then be lawful for such justices, and they are hereby required, to direct (*y*) a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpœnaed at the next assizes to be holden in and for the said county, or at the next general quarter sessions of the peace for the county, riding, division, or place, wherein such highway shall be, against the inhabitants of the parish, or the party to be named in such order, for suffering and permitting the said highway to be out of repair; and the costs (*z*) of such prosecution shall be directed by the judge of assizes before whom the said indictment is tried, or by the justices at such quarter sessions, to be paid out of the rates made and levied in pursuance of this Act in the parish in which such highway shall be situate: provided, nevertheless, that it shall be lawful for the party against whom such indictment shall be so preferred at the quarter sessions as aforesaid, to remove such indictment by *certiorari* or otherwise into the King's Bench (*a*). Sects. 94 and 95 of 5 & 6 Will. 4, c. 50, and sects. 17, 18 and 19 of 25 & 26 Vict. c. 61, apply only to admitted highways. An indictment under sects. 94 and 95 of 5 & 6 Will. 4, c. 50, for non-repair of a highway does not lie against a parish council (*b*).

Mode of indicting where party disputes his obligation to repair.

The justices, before making their order for a bill to be preferred, must be satisfied that the road is a highway (*c*).

(*u*) 27 & 28 Vict. c. 101, s. 46.

(*x*) 5 & 6 Will. 4, s. 59.

(*y*) Their order must show the highway to be in the division for which the special sessions are held, or the subsequent proceedings at quarter sessions will be void even though they show the highway within their jurisdiction: *R. v. Martin* (1843, 13 L. J. M. C. 45).

(*z*) See *ante*, p. 372.

(*a*) 5 & 6 Will. 4, c. 50, s. 95. It was held by all the judges that after conviction the judge or justices must grant an order on this section for paying the costs out of the highway rate: *R. v. Yarkhill (Inh.)* (1839), 9 C. & P. 218. The trial was of a traverse at the crown side of the assizes. They cannot grant such an order where the existence of the highway was disputed and denied by the verdict of acquittal: *R. v. Chedworth (Inh.)* (1840), 9 C. & P. 285.

(*b*) *R. v. Shipley Parish Council* (1897), 18 C. C. R. 531.

(*c*) *R. v. Johnson* (1865), 34 L. J. M. C. 85; *Ex parte Bartlett* (1860), 30 L. J. M. C. 65.

If the fact is disputed justices cannot indict under these sections (*d*); but if it is an admitted highway, and the liability to repair is simply denied, the justices are bound to direct an indictment (*e*).

Payment of costs of prosecution out of rates.

The judge of assizes mentioned in this section means one sitting under the commission of oyer and terminer, who has finally to determine the matter, and does not mean a judge sitting at *nisi prius* on circuit; and therefore, after an indictment has been removed by *certiorari* into the King's Bench, and tried on circuit, the judge has no power to order the costs of the prosecution to be paid out of the highway rates (*f*). Costs may be ordered out of the rates, though the defendant plead guilty (*g*). If the jury are discharged because they cannot agree upon a verdict, the judge or quarter sessions cannot order the costs out of the rates (*h*).

Sect. 103 of 5 & 6 Will. 4, c. 50, does not apply to costs ordered under sect. 95 of the same Act (*i*). As to the proceedings where the highway is within a highway district, see *post*.

No parish or township is bound to repair any road newly made, or any old road continued by the award of commissioners of inclosure, under 41 Geo. 3, c. 109, s. 9, till it is declared by the justices in special sessions to be fully completed and repaired (*k*).

Costs of indictment.

The reason why the parish was made liable for the costs of the indictment is, that the prosecutor, on behalf of the public, is entitled to insist on the road being repaired, if it be a highway out of repair, and he is right in coming on the parish for the repairs. If the parish seek to get rid of the liability by fixing some one else with it, then it should be disputed at the expense of the parish; but sects. 94 and 95 only apply to cases of admitted highway. Therefore, if the fact of the road out of repair being a highway is disputed, the parties are left to their ordinary remedy by indictment (*l*).

Proceedings at petty sessions if district

It is the duty of the highway board (*ll*) formed under 25 & 26 Vict. c. 61, to repair the highways within their district (*m*);

(*d*) *R. v. Farrer* (1866), L. R. 1 Q. B. 558.

(*e*) *R. v. Arnould* (1857), 27 L. J. M. C. 92; *R. v. Justices of Surrey* (1852), 21 L. J. M. C. 195.

(*f*) *R. v. Ipstones* (1868), L. R. 3 Q. B. 216.

(*g*) *R. v. Hazlemere* (1862), 32 L. J. M. C. 30.

(*h*) *R. v. Hettesbury* (1863), 8 L. T. N. S. 315.

(*i*) *R. v. Eyton* (1854), 3 E. & B. 390.

(*k*) *R. v. Hatfield (Inh.)* (1835), 4 A. & E. 156.

(*l*) *R. v. Farrer, ubi sup.*

(*ll*) By the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25, highway boards cease to exist and the district councils become their successors, and the powers, duties and liabilities of the highway authority in the district are transferred to the rural district council.

(*m*) Sect. 17.

and by sect. 18, where complaint is made to any justice of the peace that any highway within the jurisdiction of the [highway board] is out of repair, the justice shall issue two summonses, the one addressed to the [highway board], and the other to the waywarden of the parish liable to the repair of such highway, requiring such [board] and waywarden to appear before the justices at some petty sessions in the summons mentioned, to be held in the division where such highway is situate; and at such petty sessions, unless the [board] undertake to repair the road to the satisfaction of the justices, or unless the waywardens deny the liability of the parish to repair, the justices shall direct the [board] to appear at some subsequent petty sessions to be then named, and shall either appoint some competent person to view the highway and report to them on its state at such other petty sessions, or fix a day previous to such petty sessions at which two or more of such justices will themselves attend, to view the highway.

At such last-mentioned petty sessions, if the justices are satisfied either by the report of the person so appointed or by such view as aforesaid, that the highway complained of is not in a state of complete repair, it shall be their duty to make an order on the [board] limiting a time for the repair of the highway complained of; and if such highway is not put in complete and effectual repair by the time limited in the order, the justices in petty sessions shall appoint some person to put the highway into repair, and shall by order direct that the expenses of making such repairs, together with a reasonable remuneration to the person appointed for superintending such repairs, and amounting to a sum specified in the order, together with the costs of the proceedings, shall be paid by the [board]; and any order made for the payment of such costs and expenses may be recovered into the King's Bench Division in the same manner as if it were an order of general or quarter sessions, and be enforced accordingly.

The [highway] board may appear before the justices at petty sessions by their district surveyor or clerk or any member of the board (n). At several hearings before justices a [highway board] summoned under sect. 18 of 25 & 26 Vict. c. 61, admitted that they were liable to repair the roads, and did not suggest the roads were not highways. On an order to repair being made against the [board], they appealed, but in their grounds of appeal did not allege the roads were not highways. On the hearing at quarter sessions the point was taken, and the order was quashed on the ground that the roads were not highways. It was held by the divisional court, and upheld on appeal, that the [highway board] was entitled to appeal,

highway
under high-
way board out
of repair.

Order of
petty sessions
to highway
board to
repair.

(n) 25 & 26 Vict. c. 61, s. 18.

Where liability of parish to repair is denied by waywarden.

but not to raise the question whether the roads were highways (*o*). When on the hearing of any such summons respecting the repair of any highway the liability to repair is denied by the waywarden on behalf of his parish, or by any party charged therewith, the justices shall direct a bill of indictment to be preferred, and the necessary witnesses in support thereof to be subpoenaed at the next assizes to be holden in or for the said county or at the next general quarter sessions of the peace for the county, riding, division or place wherein such highway is situate, against the inhabitants of the parish or the party therewith, for suffering and permitting the said highway to be out of repair; and the costs of such prosecution shall be paid by such party to the proceedings as the court before whom the case is tried shall direct, and if directed to be paid by the parish shall be deemed to be expenses incurred by such parish in keeping its highways in repair and shall be paid accordingly (*p*). If the jury should find that the road out of repair was not a highway, the court has no jurisdiction to order payment of the costs of the prosecution (*q*). The words "liability to repair be denied" are to bear the same meaning as the words in the 95th section of the 5 & 6 Will. 4, c. 50, "if the duty or obligation of such repairs is denied," and the justices have therefore no power to order an indictment where there was no dispute by the parish of their liability to repair if the road was a highway, that latter fact being *bonâ fide* denied (*r*).

When new highways are proposed to be dedicated to parishes.

No road or occupation way made or hereafter to be made by and at the expense of any individual or private person, body politic or corporate, nor any roads already set out, or to be hereafter set out, as a private driftway or horsepath in any award of commissioners under an inclosure Act, shall be deemed or taken to be a highway which the inhabitants of any parish shall be compellable or liable to repair unless the person, body politic or corporate proposing to dedicate such highway to the use of the public, shall give three calendar months' previous notice in writing to the surveyor of the parish of his intention to dedicate such highway to the use of the public, describing its situation and extent, and shall have made or shall make the same in a substantial manner, and of the width required by this Act, and to the satisfaction of the said surveyor, and of any two justices of the peace of the division in which such highway is situate in petty sessions assembled, who are hereby required on receiving notice from such person, or body politic or corporate, to view the same,

(*o*) *Illingworth v. Bulmer East Highway Board* (1884), 53 L. J. M. C. 60.

(*p*) 25 & 26 Vict. c. 61, s. 19.

(*q*) *R. v. Buckland (Inh.)* (1865), 34 L. J. M. C. 173.

(*r*) *R. v. Farrer* (1866), L. R. 1 Q. B. 558.

and to certify that such highway has been made in a substantial manner, and of the width required by this Act at the expense of the party requiring such view, which certificate shall be enrolled at the quarter sessions holden next after the granting thereof, then and in such case after the said highway shall have been used by the public, and duly repaired and kept in repair by the said person, body politic or corporate, for the space of twelve calendar months, such highway shall for ever thereafter be kept in repair by the parish in which it is situate: provided, nevertheless, that on receipt of such notice as aforesaid, the surveyor of the parish shall summon a vestry meeting of the inhabitants of such parish, and if such vestry shall deem such highway not to be of sufficient utility to the inhabitants of the said parish to justify its being kept in repair at the expense of the said parish, any one justice of the peace, on the application of the said surveyor, shall summon the party, proposing to make the new highway, to appear before the justices at the next special sessions of the highways, to be held in and for the division in which the said intended highway shall be situate; and the question as to the utility as aforesaid of such highway shall be determined at the discretion of such justices (s); and there is an appeal under sect. 105 to the quarter sessions from the decision of the petty sessions, on the question of the utility of the road (t).

Appeal
against deci-
sion of justices
as to utility
of proposed
highway.

Where a local board are the surveyor of highways the road must be made to their satisfaction (u).

Where the highway is in a highway district the notice must be given to the [*highway board*], under 25 & 26 Vict. c. 61, s. 11, which body would then act in the place of the surveyor, and probably the district surveyor would be directed to summon the vestry.

Where any highway which any body politic or corporate or any person is liable to repair by reason of any tenure of any land or otherwise, howsoever, is duly adjudged to be out of repair, the [*highway board*] of the district in which such highway is may direct their surveyor to repair the same, and the expenses of such repair shall be paid by the party liable to repair; and any justice upon the application of any person authorized in this behalf by the highway board may summon the party liable to pay such expenses to appear before two justices at a time and place to be named in such summons; and upon the appearance of the parties, or in the absence of either of them, the justices may hear and determine the matter, and make such order as well as to costs or otherwise as to them may seem just (x). Where the rural district

Highways
repairable
ratione tenuræ,
within a high-
way district.

(s) 5 & 6 Will. 4, c. 50, s. 23.

(t) *R. v. Justices of Derbyshire* (1858), 27 L. J. M. C. 189.

(u) *R. v. Dukinfield (Inh.)* (1863), 32 L. J. M. C. 230.

(x) 25 & 26 Vict. c. 61, s. 31.

council are the highway authority the council may now by the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25 (2), repair a highway which is repairable *ratione tenuræ* without such an adjudication as is above mentioned.

Proceedings to make highways repairable, *ratione tenuræ*, &c., within a highway district, repairable by the parish.

Where any person or corporation is liable by reason of tenure of lands or otherwise to repair any highway situate in a highway district under a [highway board], the person or corporation so liable, or the [highway board] of the district in which such parish is (y), may apply to any justice of the peace for the purpose of making such highway a highway to be repaired and maintained by the parish in which the same is situate; and such justice shall thereupon issue summonses requiring the waywarden of such parish, the district surveyor, and the party so liable to repair such highway, to appear before two or more justices in petty sessions assembled; and the justices at such petty sessions shall proceed to examine and determine the matter, and shall, if they think fit, make an order under their hands that such highway shall thereafter be a highway to be thereafter repaired and maintained by the parish, and shall in such order fix a certain sum to be paid by such person or corporation to the [highway board] of the district in full discharge of all claims thereafter in respect of the repair and maintenance of such highway (z).

Appeal against an order of petty sessions making a highway repairable, *ratione tenuræ*, repairable by the parish.

Any person aggrieved by any order of justices made in pursuance of the above sect. 35 of 25 & 26 Vict. c. 61, may appeal to a court of general or quarter sessions holden within four months from the date of such order; but no such appeal shall be entertained unless the appellant has given to the other party to the case a notice in writing of such appeal and of the matter thereof within fourteen days after such order and seven clear days at the least before such sessions, and has entered into a recognizance with two sufficient sureties, before a justice of the peace, conditioned to appear at the said sessions, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as may by the court be awarded; and upon such notice being given and such recognizance being entered into, the court at such sessions shall hear and determine the matter of the appeal, and shall make such order thereon, with or without costs to either party, as to the court may seem meet (a).

From and after the making of such order by the justices or by the sessions on appeal, such highway becomes repairable in all respects as a parish highway (b).

Disqualification of justice for acting on

No justice of the peace shall act as such in any matter in which he has already acted as a member of the highway

(y) 27 & 28 Vict. c. 101, s. 24.

(z) 25 & 26 Vict. c. 61, s. 35.

(a) *Ibid.*

(b) *Ibid.*

board, and in which the decision of such board is appealed against (*c*); but the mere fact that he is, by virtue of his office, a member of a highway board complaining, is not to disable him from acting as a justice of the peace in a matter at petty or special sessions (*d*); but a justice must not adjudicate on a final order when he has appeared by counsel in opposition to the provisional order (*e*).

appeal who has acted as a member of highway board.

Where any waywarden of a highway parish of a district, or any ratepayer of such parish, feels aggrieved in respect of the matters following: in respect of any order of the highway board for the repair of any highway in his parish, on the ground that such highway is not legally repairable by the parish, or in respect of any other order of the board, on the ground that the matter to which such order relates is one in regard to which the board have no jurisdiction to make an order, he may, upon complying with the conditions mentioned, appeal to the court of general or quarter sessions having jurisdiction in the district (*f*).

Appeal given to waywarden or ratepayer, when.

See *post*, "Highway Rates," for the sections 38 and 39 in full.

If upon the hearing of the appeal it appears to the court of quarter sessions that the question in dispute involves an inquiry as to whether a road is or is not a highway repairable by the public, or an inquiry as to any other important matter of fact, the court may either themselves decide such question, or may impanel a jury of twelve disinterested men out of the persons returned to serve as jurymen at such quarter sessions, and submit to such jury such questions in relation to the matters of fact in dispute as the court think fit; and the verdict of such jury, after hearing the evidence adduced, shall be conclusive as to the questions submitted to them.

Hearing of the appeal. Power to summon a jury where the dispute is whether a road is repairable or not.

The questions so submitted shall be in the form and shall be tried as nearly as may be in the manner in which feigned issues are ordinarily tried, and the court shall decide the parties to be plaintiffs and defendants in such trials.

Subject as aforesaid the court may, upon the hearing of any appeal under this Act, confirm, reverse or modify any order of the highway board, or rectify any account appealed against (*g*).

If the appellant is successful the costs shall, unless the court otherwise orders, be paid by the board, and shall be charged to the parishes within the jurisdiction of the board, other than the parish to which the appellant belongs, in the same proportions in which such parishes contribute to the common fund of the board.

Costs of appeal.

(*c*) 25 & 26 Vict. c. 61, s. 38.

(*d*) 27 & 28 Vict. c. 101, s. 46.

(*e*) *R. v. Justices of Cumberland* (1878), 42 J. P. 361.

(*f*) 27 & 28 Vict. c. 101, s. 38; see section in full, pp. 567, 568.

(*g*) *Ibid.* s. 42.

If the appellant is unsuccessful, the board, if the waywarden be the appellant, may charge the costs of the appeal to the parish to which the appellant belongs, in the same manner as if they were expenses incurred in repairing the roads in such parish, and may levy the sum accordingly, and may carry the sum so levied to the account of the several parishes within the jurisdiction of the board, other than the parish to which the appellant waywarden belongs, in the same manner as if they were expenses contributed by such parishes to the common fund of the board; but if some ratepayer other than the waywarden is appellant the court may order the costs of the appeal to be paid by such appellant; and such costs shall be recoverable in the same manner as a penalty is recovered under the Highway Act, 1862 (*h*). Such penalties are recoverable under 11 & 12 Vict. c. 43, by the 47th section of the 25 & 26 Vict. c. 61, by which section an appeal to quarter sessions is given, where the amount of the money recoverable is more than five pounds, in manner provided by 24 & 25 Vict. c. 96, s. 110.

Order directing unnecessary highways to cease to be repairable.

When any highway board consider any highway unnecessary for public use, they may direct the district surveyor to apply to two justices to view the same, and thereupon the like proceedings shall be had as where application is made under the Highway Act, 1835, to procure the stopping up of any highway, save only that the order to be made thereupon, instead of directing the highway to be stopped up, shall direct that the same shall cease to be a highway which the parish is liable to repair, and the liability of the parish shall cease accordingly, and for the purpose of such proceedings under this enactment such variation shall be made in any notice, certificate or other matter preliminary to the making of such order, as the nature of the case may require (*i*).

Proceedings to revive the liability of a parish to repair a highway which has ceased to be repairable under an order of justices.

Provided that if at any time thereafter, upon application of any person interested in the maintenance of such highway, after one month's previous notice in writing thereof to the clerk of the highway board for the district in which such highway is situated, it appear to any court of general or quarter sessions of the peace that from any change of circumstances since the time of the making of any such order as aforesaid under which the liability of the parish to repair such highway has ceased, the same has become of public use, and ought to be kept in repair by the parish, they may direct that the liability of the parish to repair the same shall revive from and after such day as they may name in their order, and such liability shall revive accordingly, as if the first-mentioned order had not been made; and the said court may by their order direct the expenses of and incident to such application to be paid as they may see fit (*i*).

The words "like proceedings shall be had" carry with them

(*h*) 27 & 28 Vict. c. 101, s. 43.

(*i*) *Ibid.* s. 21.

the right of appeal to quarter sessions under 5 & 6 Will. 4, c. 50, s. 35 (*k*).

Procedure under these sections is still existent, but proceedings for the discontinuance of unnecessary highways are now usually taken under 41 & 42 Vict. c. 77, s. 24, which provides that if any authority liable to keep any highway in repair is of opinion that the highway is unnecessary for public use, such authority may apply to the court of summary jurisdiction of the petty sessional division to view the highway, and public notices having been given as provided by the section, the court of summary jurisdiction having heard any persons objecting to the order, may then dismiss the application or declare the highway unnecessary. Any order of a court of summary jurisdiction under this section shall be deemed to be an order from which an appeal lies to a court of quarter sessions.

SECTION 3.

HIGHWAY RATES.

Appeals against Rates.

If any person feels aggrieved by any rate levied on him for the purpose of raising moneys payable under a precept of a [highway board], on the ground of incorrectness in the valuation of any property included in such rate, or of any person being put on or left out of such rate, or of the inequality or unfairness of the sum charged on any person or persons therein, he may appeal to the justices in special sessions in manner provided by 6 & 7 Will. 4, c. 96, ss. 6 and 7, and all the provisions of the said sections shall be applicable to such appeal (*l*).

Appeal to special sessions against rate to meet the precept of the highway board.

The 6th section of 6 & 7 Will. 4, c. 96, enacts, that the justices acting in and for every petty sessions division shall, four times at least in every year, hold a special sessions for hearing appeals against the rates of the several parishes within their respective divisions, and shall cause public notice of the time and place when and where such special sessions will be holden to be affixed to or near to the door of the parish church of the said parishes twenty-eight days, at the least, before the holding of the same; and such special sessions shall and may be adjourned from time to time by the justices there present as they may think fit; and at such special or adjourned sessions the justices there present shall hear and determine all objections to any such rate on the

Objections to the rate on appeal to special sessions.

(*k*) *R. v. Justices of Surrey* (1870), L. R. 5 Q. B. 87.

(*l*) 27 & 28 Vict. c. 101, s. 37.

Notice of
appeal from
special
sessions.
Recognizance
to try appeal.

Judgment
of quarter
sessions to
be final.

Limited
jurisdiction
of special
sessions.

Appeal to
special
sessions.
Power to
amend rate.

ground of inequality, unfairness or incorrectness in the valuation of any hereditaments included therein, which decision shall be binding and conclusive on the parties unless the person or persons impugning such decision shall, within fourteen days after the same shall have been made, cause notice to be given in writing of his, her or their intention of appealing against such decision, and of the matter or cause of such appeal, to the person or persons in whose favour such decision shall have been made; and within five days after giving such notice shall enter into a recognizance before some justice of the peace with sufficient securities conditioned to try such appeal at the then next general sessions or quarter sessions of the peace, which shall first happen, and to abide the order of and pay such costs as shall be awarded by the justices at such quarter sessions or any adjournment thereof; and such justices, upon hearing and finally determining such matter of appeal, shall and may, according to their discretion, award such costs to the party or parties appealing or appealed against as they shall think proper; and their determination in or concerning the premises shall be conclusive and binding on all parties to all intents and purposes whatsoever: provided always, that no such objection shall be inquired into by the said justices in special session unless notice of such objection in writing under the hand of the complainant shall have been given seven days, at least, before the day appointed for such special session to the collector, overseer or other persons by whom such rate was made: provided also, that the said justices in special session shall not be authorized to inquire into the liability of any hereditaments to be rated, but only into the true value thereof, and into the fairness of the amount at which the same shall have been rated.

It is sufficient if the recognizance be verbally acknowledged within the five days: it may be perfected afterwards (*m*). Objections to any rate must be brought before the first practicable special sessions held after the publication of the rate, having regard to the necessity for giving notice of objection to the collector, &c. (*n*).

Notice of objection served on one of the overseers by whom the rate was made is sufficient (*o*).

By sect. 7, the justices present at any such special or adjourned sessions shall for the aforesaid purpose have all the powers of amending or quashing any such rate so objected to of any parish or other district within their division, and likewise of awarding costs to be paid by or to any of the parties, and of recovering such costs which any court of quarter sessions of the peace has upon appeals from any such rate,

(*m*) *R. v. St. Albans* (1838), 8 L. J. M. C. 33.

(*n*) *R. v. Justices of Lancashire* (1850), 19 L. J. M. C. 199.

(*o*) *R. v. Devon* (1848), 3 New Sess. C. 96.

except as herein excepted: provided always, that no order of the said justices shall be removed by *certiorari* or otherwise into any of his Majesty's courts of record at Westminster: provided also, that nothing in this Act contained shall be construed to deprive any person or persons of the right to appeal against any rate to any court of quarter sessions: provided also, that no order of the said justices in special session shall be of any force pending any appeal touching the same subject-matter to the court of quarter sessions having jurisdiction to try such appeal, or in opposition to the order of any such court upon such appeal.

Not to hinder appeal to quarter sessions.

Every rate shall contain the names of the occupiers, the description of the premises or property they occupy, and the full annual value of such premises or property, and shall also specify the sum in the pound at which it is made, and no rate to be levied or assessed as aforesaid shall exceed at any one time the sum of tenpence in the pound, or the sum of two shillings and sixpence in the pound in the whole in any one year: provided, nevertheless, that with the consent of four-fifths of the inhabitants of any parish contributing to the highway rate assembled at a meeting specially called for that purpose, ten days' previous notice of the same having been given by the surveyor of the said parish, the rate to be levied and assessed as aforesaid may be increased to such sum as the said inhabitants so assembled may think proper (*p*).

Form of the rate.

Rate must not exceed tenpence in the pound.

Rates in the year must not exceed two shillings and sixpence in the pound.

So, when the highway rate is required for a [*highway board*] of a highway district, it is enacted, that no contribution to be paid by any parish at any one time in respect of highway rates shall exceed the sum of tenpence in the pound, and the aggregate of contributions required to be paid by any parish in any one year in respect of highway rates shall not exceed the sum of two shillings and sixpence in the pound, except with the consent of four-fifths of the ratepayers of the parish in which such excess may be levied present at a meeting specially called for the purpose, of which ten days' previous notice has been given by the waywarden of such parish, and then only to such extent as may be determined by such meeting (*q*).

A contribution order of highway board must not exceed the like amount.

Errors in highway rates may be rectified by the surveyor, with the consent and approbation of justices at special or petty sessions signed by the justices.

Whenever it shall appear to the surveyor that there has been any omission or error in any rate or assessment made under the Act, or in the name of any person, parson or vicar, or of any house, shop, warehouse, coach-house, stable, cellar, vault, building, workshop, manufactory, garden ground, land, tenement, wood, tithe, mines, pits or quarries of any minerals, stone or other matter whatsoever, or hereditament liable to be

Surveyor, with consent of special sessions, may amend rate.

(*p*) 5 & 6 Will. 4, c. 50, s. 29.

(*q*) 27 & 28 Vict. c. 101, s. 33.

rated for the purposes of this Act, it shall be lawful for the surveyor, with the consent and approbation of the justices at a special sessions (*r*), to cause to be added or corrected in the said rate or assessment the name of the person, parson or vicar omitted, or erroneously stated, and a description of the property in respect of which he ought to be rated; and every such addition or correction made in any of the said rates and signed by such justices shall be as valid and effectual as if the same had been part of the original rate at the time when it was first made (*s*).

Justices at special or petty sessions may direct a person to be excused from the payment of a highway rate upon proof, after summoning the surveyor, of the inability through poverty of such person to pay the rate, and their order is final (*t*). They are also to fix the payments to be made in respect of task-work, and to hear any complaints of the surveyor respecting the manner in which it is performed (*u*), and to hear complaints of the surveyor in respect of his accounts, &c. against the rate collector, and adjudicate upon them (*x*).

Appeal to
quarter ses-
sions.

An appeal direct to quarter sessions is also given by 5 & 6 Will. 4, c. 50, s. 105, which enacts, that "if any person shall think himself aggrieved by any rate made under or in pursuance of this Act, or by any order, conviction, judgment or determination made, or by any matter or thing done by any justice or other person in pursuance of this Act and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next general or quarter sessions of the peace. . . ."

On appeal,
provisions of
41 Geo. 3,
c. 23, to
apply.

In all cases of appeal against the rate or assessment made under 5 & 6 Will. 4, c. 50, the several provisions and enactments contained in 41 Geo. 3, c. 23, "An Act for the better Collection of Rates made for the Relief of the Poor" (*xx*), shall be applicable as if the same had been repealed and re-enacted in this Act with respect to such appeals (*y*). Provided always, that no rate nor any proceeding to be had touching any order made, or other matter or thing done or transacted in or relative to the execution of this Act shall be vacated or quashed for want of form or be removed or removable (except

(*r*) Or petty: 27 & 28 Viet. c. 101, s. 46.

(*s*) 5 & 6 Will. 4, c. 50, s. 31.

(*t*) *Ibid.* s. 32.

(*u*) *Ibid.* s. 35.

(*x*) *Ibid.* s. 38.

(*xx*) By 41 Geo. 3, c. 23, s. 1, on appeal quarter sessions may amend or quash the rate, but the sums assessed are to be levied and applied in satisfaction of the next effective rate; by sect. 4 notice of appeal is to be in writing and to state grounds of appeal; by sect. 5, although no notice is given, appeals may be decided by consent of the parties; by sect. 6 notice must be given to persons interested.

(*y*) 5 & 6 Will. 4, c. 50, s. 106.

as herein mentioned) by *certiorari* (*z*); but by sect. 108, in any case of appeal, the court of quarter sessions, before whom the same is heard and determined, may, if they think fit, state the facts specially for the determination of the King's Bench Division. Defects in the grounds of appeal can now be remedied under the Quarter Sessions Act, 1849 (*a*).

An appeal does not lie under the 105th section to the quarter sessions at the instance of the parishioners against the allowance of the surveyor's accounts at special sessions (*b*); nor against, nor at the instance of the surveyor against, a disallowance of them (*c*); but it does against a decision of justices at special sessions, under sect. 23, upon the utility of a highway proposed to be dedicated (*d*). And though the court of quarter sessions dismiss an appeal against a decision of petty sessions dismissing an appeal against the allowance of the accounts of surveyors of highways, on the ground that they (the quarter sessions) had no jurisdiction to hear it, they have power to give costs under the 12 & 13 Vict. c. 45, s. 5 (*e*).

When appeal does not lie.

When appeal lies.

A case stated under 20 & 21 Vict. c. 43, on an application to justices to issue their distress warrant to enforce a highway rate, has been held not the proper mode of raising the question whether the land rated was exempt from highway rates, and an appeal raised in that manner has been dismissed (*f*).

A notice of appeal need not be personally served on the respondent (*g*).

Service of a notice of appeal.

Where any sum adjudged to be paid under the 25 & 26 Vict. c. 61, in respect of penalties under that Act, or moneys recoverable as penalties, exceeds 5*l*., an appeal may be had by any person aggrieved to a court of general or quarter sessions formerly in manner provided by the 110th section of

Appeal against penalties imposed under the Highways

(*z*) 5 & 6 Will. 4, c. 50, s. 107.

(*a*) 12 & 13 Vict. c. 45, ss. 3—6.

(*b*) *R. v. Justices of West Riding* (1841), 1 Q. B. 624.

(*c*) *R. v. Justices of Leicestershire* (1857), 8 E. & B. 557.

(*d*) *R. v. Justices of Derbyshire* (1858), 27 L. J. M. C. 189.

(*e*) *R. v. Padwick* (1858), 27 L. J. M. C. 113.

(*f*) *Walker v. The Great Western Rail. Co.* (1859), 2 E. & E. 325; *R. v. Newman* (1860), *ib.* 420. But the ground of decision in this case was that the appellant was seeking to obtain relief by way of the special case which he might and ought to have sought by way of appeal to the sessions. The disapproval of the procedure by special case in *Walker v. Great Western Rail. Co.*, *sup.*, would seem to have been based entirely upon the nature of the particular question raised in that case. It is submitted that the probable explanation of the disapproval by the court is that the decision of the court in that case would not have afforded protection to the justices against an action for trespass for seizure under their warrant. If the procedure had been under 11 & 12 Vict. c. 44, s. 5, that protection would have been afforded. It is submitted that the propriety of proceeding by way of special case depends upon the nature of the questions intended to be raised. But now see *Steele v. Brannan* (1872), 41 L. J. M. C. 85.

(*g*) *R. v. Justices of North Riding* (1845), 7 Q. B. 154.

Better Man-
agement Act,
25 & 26 Vict.
c. 61.

the 24 & 25 Vict. c. 96 (Larceny Act, 1861); but that part of the section having been repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43, s. 4, Sched.), the procedure on appeals is now regulated by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

Appeal to
quarter ses-
sions by way-
warden or
ratepayer.

Where any waywarden of a highway parish of a district, or any ratepayer of such parish, feels aggrieved in respect of the matters following:—

- (1.) In respect of an order of the highway board for the repair of any highway in his parish, on the ground that such highway is not legally repairable by the parish, or in respect of any other order of the board, on the ground that the matter to which such order relates is one in regard to which the board have no jurisdiction to make an order:
- (2.) In respect of any item of expense charged to the separate account of his parish, on the ground that such item of expense has not in fact been incurred, or has been incurred in respect of a matter upon which the board have no authority by law to make any expenditure whatever:
- (3.) In respect of any item of expenditure charged to the district fund, on the ground that such item of expense has not in fact been incurred, or has been incurred in respect of a matter upon which the board has no authority by law to make any expenditure whatever:
- (4.) In respect of the contribution required to be made by each parish to the district fund, on the ground that such amount, when compared with the contribution of other parishes in the district, is not according to the proportion required by this Act:

He may, upon complying with the conditions hereinafter mentioned, appeal to the court of general or quarter sessions having jurisdiction in the district; but no appeal shall be had except in respect of the matters and upon the grounds hereinbefore mentioned (*h*).

Conditions of
appeal as to
time.

No appeal shall be entertained by any court of general or quarter sessions in pursuance of this Act unless the following conditions have been complied with—

- (1.) Notice of the intention of appeal must be served by the appellant on the clerk of the highway board in the case of an appeal against an order within two months after the order, and in the case of an appeal in respect of any item of expense or contribution, within one month after the statement of the account of the board has been sent to each member of the board as mentioned in the Act:

(*h*) 27 & 28 Vict. c. 101, s. 38.

(2.) The notice must state the matter appealed against and the ground of the appeal.

On the receipt of the notice the board may serve a counter notice on the appellant requiring him to appear in person, or by his agent, at the next meeting of the board, and support his appeal. How the highway board may bar the appeal.

On hearing the appellant, the board may rectify the matter complained of, and if they do so to a reasonable extent, and tender to the appellant a reasonable sum for the costs of his attendance, it shall not be lawful for the appellant to proceed with his appeal.

In any other case the appellant may proceed with his appeal, and the reasonable costs of his attendance on the board shall be deemed part of the costs of the appeal (*i*).

If at any time after notice of appeal has been given it appears to the court of general or quarter sessions, on the application of either party in the presence of or after notice has been given to the other party, that the matter in question in such appeal consists only or in part of matters of mere account which cannot be satisfactorily tried by the court, it shall be lawful for such court to order that such matters, either wholly or in part, be referred to the arbitration of one or more persons to be appointed by the parties, or in case of disagreement by the court; and the award made on such arbitration shall be enforceable by the same process as the order of the court of quarter sessions (*k*). As to enforcing an order of quarter sessions, see 12 & 13 Vict. c. 45, s. 18, *ante*, p. 479. Power to the court to refer the appeal to arbitration.

And the provisions of the "Common Law Procedure Act, 1854," relating to compulsory references, shall be deemed to extend to arbitrations directed by the court of quarter sessions; and the word "court" in the said Act shall be deemed to include the court of quarter sessions (*l*). These provisions are now repealed by the Arbitration Act, 1889, and the provisions of the latter Act as to compulsory reference are substituted for those of the former Act.

In the Highway Act, 1862, the word "parish" includes any place maintaining its own highways; and the expressions "highway district" and "highway board" shall refer only to highway districts formed and highway boards constituted under that Act. Meaning of term "parish," under Highway Acts.

The formation of highway districts was formerly governed by 25 & 26 Vict. c. 61, ss. 5, 6 and 7. These sections still remain unrepealed, but are not here treated of, as the provisions of the Local Government Act, 1894, have rendered them obsolete. Formation of highway districts.

(*i*) 27 & 28 Vict. c. 101, s. 39.

(*k*) *Ibid.* s. 40.

(*l*) *Ibid.* s. 41.

CHAPTER IV.

OF APPEALS AGAINST POOR RATES.

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SECTION 1.

OF THE VALUATION LIST AND APPEAL AGAINST SUCH LIST.

By the Union Assessment Committee Act, 1862 (*a*), the board of guardians of every union, formed under 4 & 5 Will. 4, c. 76, shall every year appoint a certain number of their body to be the assessment committee of the union for the investigation and supervision of valuations to be made in such union. By sect. 14, subject to any order which may be made by the committee, the overseers of each parish in the union shall make a list of all the rateable hereditaments in such parish, with the annual value thereof respectively, in so much of the form shown in the schedule annexed to 6 & 7 Will. 4, c. 96, as is set out in the schedule to this Act, and such list is to be styled "the valuation list." By sect. 17, the valuation list, made and signed by the overseers, shall be deposited by the overseers in the place in such parish in which rate books are deposited. And by sect. 18, any overseer or overseers of any

Place of deposit of list.

(*a*) 25 & 26 Vict. c. 103.

parish in any union who have reason to think that such parish is aggrieved by the valuation list of any parish within such union, or any person who may feel himself aggrieved by any valuation list on the ground of unfairness or incorrectness in the valuation of any hereditaments included therein, or on the ground of the omission of any rateable hereditament from such list, may at any time after the deposit of such list, and before the expiration of twenty-eight days after the notice of the deposit, give to the committee and to the overseers a notice in writing of his objection, specifying the grounds thereof; and when the ground shall be unfairness or incorrectness in the valuation of any hereditament in respect of which any person other than the person objecting is liable to be rated, or the omission of such hereditament, shall also give notice in writing of such objection, and of the ground thereof, to such other person.

Appeal
against valuation
list.

By sect. 24, every valuation list approved by the committee, and delivered to the overseers of the parish to which the same relates, shall with and subject to the alterations and additions for the time being made therein or thereto by any supplemental valuation lists so approved and delivered, be the valuation list in force in such parish except in the case of any parish in which the poor rate or assessment for the poor rate is made under the authority of a local Act, until a new valuation list in substitution for the same be approved and delivered in like manner.

Provision is made for new valuations and supplemental lists, and by sect. 28, in every parish where a valuation list under this Act has been approved and delivered to the overseers, no rate for the relief of the poor, or other rate which by law is required to be based upon the poor rate, shall be of any force unless the hereditaments included in such rate, except as therein provided, be rated according to the annual rateable value thereof appearing in the valuation list in force in such parish.

Poor rate
must be on
value appear-
ing in valua-
tion list.

An appeal lies against a valuation list by the overseers of a parish in a union under sect. 32, which enacts, that if the overseer or overseers of any parish in any union shall have reason to think that such parish is aggrieved by the valuation list of any parish within such union, whether it be on the ground that the rateable hereditaments comprised in the valuation list of such parish are valued at sums beyond the annual rateable value thereof, or on the ground that the rateable hereditaments comprised in the valuation list of some other parish in such union are valued at sums less than the annual rateable value thereof, it shall be lawful for such overseer or overseers, with the consent of a vestry summoned for the purpose of considering the expediency of giving such consent, to appeal to the quarter sessions for the county or borough in which the greatest number of parishes belonging to the union is situate, or in case the number of parishes in any

Appeal by
overseers on
behalf of a
parish against
a valuation
list.

two or more such jurisdictions is equal to the quarter sessions of the county or borough having jurisdiction over the parish in which the workhouse of the union is situate, at the sessions to be holden after the expiration of a month after the allowance of and deposit of such valuation list as aforesaid, against such valuation list of the parish which shall appear to be overvalued or undervalued; and if in any case any such overseer or overseers appeal against the valuation list of any other parish on the ground that the rateable hereditaments in such list are valued at less than the annual rateable value thereof, such overseer or overseers shall give fourteen clear days' notice in writing previous to the first day of the said quarter sessions at which the appeal is to be made of the intention to appeal and the grounds thereof, to the overseers of the poor of such parish and to the guardians of the union comprising such parish; and if any overseer or overseers of any parish appeal against the valuation list of such parish on the ground that the rateable hereditaments in such list are valued beyond the annual rateable value thereof, such overseer or overseers shall give fourteen days' notice in writing previous to the quarter sessions at which the appeal is to be made of the intention to appeal and the grounds thereof to the guardians of the union in which such parish shall be situate, the said court shall be empowered to hear and determine such appeal, and either confirm such valuation list or correct such irregularities or inaccuracies as shall be proved to exist therein as to them may appear fair and just; but no such valuation list shall upon such appeal be quashed or destroyed in regard to any other parish, unless the court deem it necessary to proceed to the making of an entire new valuation list as thereafter provided.

SECTION 2.

OF THE RIGHT OF APPEAL AGAINST POOR RATES, AND TO WHAT SESSIONS.

Who may
appeal.

The right of appealing against rates for relief of the poor was given originally by 43 Eliz. c. 2, s. 6, which enables any persons who shall find themselves grieved with any cess or tax, or other act done by the churchwardens and other persons, or by the justices allowing the rate, to appeal generally to the general quarter session, who were to make such order thereon as by them should be thought convenient; the same to conclude and bind all parties. This provision being thought to confine the remedy to persons complaining of pecuniary grievance, stat. 17 Geo. 2, c. 38, s. 4, gives the right of appeal to any person who "shall find himself aggrieved by any rate or assessment made for the relief of the poor; or shall have any material objection to any

person or persons being put on or left out of such rate or assessment, or to the sum charged on any person or persons therein; or shall have any material objection to such account (*i.e.*, the overseers' accounts) as aforesaid, or any part thereof; or shall find himself aggrieved by any neglect, act or thing done or omitted by the churchwardens and overseers of the poor, or by any of his Majesty's justices of the peace." Under this clause it behoves all parties, complaining of insertions or omissions made improperly in a rate for election purposes, to appeal; for they will not be permitted to impeach the rate, against which they made no appeal, either on the trial of an election petition, or at the revision court (*b*), unless the rate be void altogether, and therefore no rate at all; as where it has not been allowed by two justices (*c*), or they can show general criminality and fraud in the parish officers. A rate cannot be abandoned by overseers after its allowance and publication; and the only mode of getting rid of it is by quashing it at the sessions on appeal (*d*). Thus, where a sessions refused to hear an appeal against a rate, because the respondents had previously given notice of abandoning it, a mandamus issued to compel the hearing (*e*); but if the rate is bad and cannot be supported, the overseers ought not to incur the expense of appearing at sessions to support it, and their costs of such appearance will be disallowed (*f*). Though where the rate is a nullity it may be disregarded. The safest remedy against an improper rating is by appeal; for, if the objections rest on inadequate description of property in the rate (*g*), or on any other ground short of absolute want of jurisdiction by the justices (*e.g.*, the nullity of the rate as regards the party assessed, where he is not rateable at all), an appeal is the only remedy (*h*).

If the rate is good on its face, and made by competent authority, and on a person and in respect of occupation of property apparently within the jurisdiction of that authority, the only remedy of the person seeking to resist it is by appeal (*i*). So, if the party rated, being in the visible occupation of property within the rating parish, objects that his occupation is devoid of benefit to him, his remedy is by appeal (*k*); and such an objection cannot be urged in opposi-

When appeal is the only remedy.

(*b*) *Baker v. Loake* (1864), 34 L. J. C. P. 49.

(*c*) *Fox v. Davies* (1848), 18 L. J. C. P. 48; *Bushell v. Luckett* (1846), 2 C. B. 111.

(*d*) *R. v. Justices of Cambridge* (1834), 4 L. J. M. C. 8.

(*e*) *R. v. Recorder of Stamford* (1838), 1 P. & D. 72.

(*f*) *R. v. Fouch* (1841), 2 Q. B. 308.

(*g*) *Cortis v. Kent Waterworks Co.* (1827), 7 B. & C. 314.

(*h*) See *Marshall v. Pitman* (1833), 9 Bing. 595, collecting the cases from *Milward v. Caffin* (1779), 2 W. Bl. 1330.

(*i*) *Overseers of Birmingham v. Shaw* (1849), 18 L. J. M. C. 89; *R. v. Justices of Kingston* (1858), 27 L. J. M. C. 199.

(*k*) *Overseers of Birmingham v. Shaw* (1849), 18 L. J. M. C. 89; *R. v.*

tion to an application for a distress warrant at petty sessions (*l*); but if the land in respect of which the rate is imposed is locally situate out of the rating parish (*m*), or if the person rated is not the occupier, in fact, of the premises (*n*), an appeal is not necessary; but the rate may either be appealed against on that ground, or may be treated as void, and its enforcement by the justices resisted, or an action be brought against the party enforcing it. And the same principle applies to a person rated as an inhabitant possessing visible personal property in the parish. If he be, in fact, an inhabitant, he must appeal, though he has no rateable property of any value (*o*).

Form of the heading of a rate.

A rate by its heading, or something appearing on its face, must give information as to the purpose for which it is made, or by whose authority it is made (6 & 7 Will. 4, c. 96, s. 2); and, therefore, a poor rate made with a heading merely naming the parish, stating the date on which the rate was made, without stating for what purpose, whether for the relief of the poor or otherwise, is void, and cannot be enforced though not appealed against (*p*); but if a poor rate has a heading showing sufficiently the purpose for which it is made, and does not describe the property rated sufficiently in the columns of the form of rate given by the Parochial Assessment Act, and omitted to fill up the column as to situation of property or estimated extent, the rate is not therefore void, but is liable to be appealed against to the sessions, who will inquire whether the deviations from the form are substantial or not (*q*). But if the sessions, in the case of a farm extending into two parishes, are satisfied upon the evidence that the farmer rated occupies land in the parish of the extent and value at which he is assessed, they are not bound to determine the boundaries, or to say that this particular close belongs to one parish, and this other close to another (*r*).

To what sessions in respect of place and time.

This appeal must be made to the general or quarter sessions of the peace for the particular jurisdiction in which the parish lies, whether county, riding, or other division. If it be situate in the borough of a corporate city or town, having a grant of a court of separate quarter sessions under the late Municipal Corporations Act, 1835 (*s*), the appeal may be to that court. But there, as well as in franchises or corporate towns where

Justices of Kingston (1858), 27 L. J. M. C. 199; *R. v. Bradshaw* (1860), 29 L. J. M. C. 176; *Mersey Docks v. Cameron* (1861), 30 L. J. M. C. 194.

(*l*) *R. v. Bradshaw*, *ubi sup.*

(*m*) *Weaver v. Price* (1832), 3 B. & Ad. 409; *Milward v. Cuffin* (1779), 2 W. Bl. 1330.

(*n*) *Amherst v. Sommers* (1788), 2 T. R. 372.

(*o*) *Marshall v. Pitman* (1833), 9 Bing. 595.

(*p*) *R. v. Eastern Counties Rail. Co.* (1856), 25 L. J. M. C. 49.

(*q*) *Ibid.*

(*r*) *R. v. Woods* (1858), 27 L. J. M. C. 289.

(*s*) 5 & 6 Will. 4, c. 76, s. 105.

no such separate court is so granted, and having less than six corporate justices, it seems that this appeal may still be to the sessions of the county, riding or division^(t). These enactments do not, however, apply to boroughs having quarter sessions and a recorder under 45 & 46 Vict. c. 50. By sect. 144 of that Act appeals lie to the recorder. But in the case of boroughs which were subject to the jurisdiction of county justices at the date of the Municipal Corporations Act, 1835, appeals against rates still lie to the county quarter sessions, although the borough may have a separate court of quarter sessions^(u).

By 6 & 7 Will. 4, c. 96, s. 6, the justices acting in and for every petty sessions division shall, four times at least in every year, hold a special sessions for hearing appeals against the rates of the several parishes within their respective divisions, and shall cause public notice of the time and place when and where such special sessions will be holden to be affixed to or near to the door of the parish church of the said parishes twenty-eight days, at the least, before the holding of the same; and such special sessions shall and may be adjourned from time to time by the justices there present, as they may think fit; and at such special or adjourned sessions, the justices there present shall hear and determine all objections to any such rate on the ground of inequality, unfairness or incorrectness in the valuation of any hereditaments included therein, which decision shall be binding and conclusive on the parties, unless the person or persons impugning such decision shall, within fourteen days after the same shall have been made, cause notice to be given in writing of his, her or their intention of appealing against such decision, and of the matter or cause of such appeal, to the person or persons in whose favour such decision shall have been made; and within five days after giving such notice shall enter into a recognizance before some justice of the peace with sufficient sureties, conditioned to try such appeal at the then next general sessions or quarter sessions of the peace which shall first happen, and to abide the order of and pay such costs as shall be awarded by the justices at such quarter sessions, or any adjournment thereof; and such justices, upon hearing and finally determining such matter of appeal, shall and may, according to their discretion, award such costs^(uu) to the party or parties appealing or appealed against as they shall think proper, and their determination in or concerning the premises shall be conclusive and binding on

To and from
special
sessions.

Notice of
appeal.

Recognizance.

Appeal
to quarter
sessions from
decision of
special
sessions.

(t) 17 Geo. 2, c. 38, s. 4; 1 Geo. 4, c. 36; see *R. v. Justices of Essex* (1816), 5 M. & S. 513.

(u) *R. v. Bridgwater* (1839), 10 A. & E. 711. To ascertain whether a borough was subject to the jurisdiction of the county justices previous to 1835, the charter of the borough should be referred to in order to see whether it contains a *non intromittant* clause.

(uu) As to powers under this section of justices sitting in quarter sessions over costs of appeal to special sessions, see *R. v. Justices of Cornwall*, [1903] 2 K. B. 178; and *ante*, p. 480.

all parties to all intents and purposes whatsoever: provided always, that no such objection shall be inquired into by the said justices in special sessions, unless notice of such objection in writing under the hand of the complainant shall have been given seven days at least before the day appointed for such special sessions to the collector, overseers or other persons by whom such rate was made (*x*): provided also, that the said justices in special session shall not be authorized to inquire into the liability of any hereditaments to be rated, but only into the true value thereof, and into the fairness of the amount at which the same shall have been rated.

Justices in special sessions may, it seems, state a case under 42 & 43 Vict. c. 49, s. 33 (*y*).

It is sufficient if the recognizances under this section be verbally acknowledged before a justice within the five days, for the record of the recognizances may be drawn up afterwards from the minute then made (*z*).

The appeal to the special sessions must be to the next practicable special sessions or within a reasonable time (*a*), and not later than the second after publication of the rate (*b*).

Power to
amend and
quash rate,
and order
costs at
special
sessions.

By 6 & 7 Will. 4, c. 96, s. 7, the justices present at any special or adjourned session mentioned in sect. 6 (*supra*) shall for the aforesaid purpose have all the powers of amending or quashing any such rate so objected to, of any parish or other district within their division, and likewise of awarding costs to be paid by or to any of the parties, and of recovering such costs which any court of quarter sessions of the peace has upon appeal from any such rate except as herein excepted: provided always, that no order of the said justices shall be removed by *certiorari* or otherwise into any of his Majesty's courts of record at Westminster: provided also, that nothing in this Act contained shall be construed to deprive any person or persons of the right to appeal against any rate to any court of general or quarter sessions: provided also, that no order of the said justices in special session shall be of any force pending any appeal touching the same subject-matter to the court of general or quarter sessions of the peace having jurisdiction to try such appeal, or in opposition to the order of any such court upon such appeal.

Appeal
against rate
to quarter
sessions pre-
served.

Special sessions have only the powers as to costs possessed by quarter sessions at the time when 6 & 7 Will. 4, c. 96, was

(*x*) It is sufficient if notice of objection be served on one of the overseers or other persons by whom the rate was made: *R. v. Justices of Devon* (1848), 3 New Sess. Cas. 96; but as to service of notice on rural district council in place of overseers, see now *R. v. Justices of Tewkesbury*, [1903] 1 K. B. 39, *post*, p. 580.

(*y*) See also *Leicester (Deputy Freeman) v. Lewitt* (1893), 68 L. T. N. S. 201.

(*z*) *R. v. Justices of St. Albans* (1838), 8 L. J. M. C. 33.

(*a*) *R. v. Justices of Lancashire* (1850), 19 L. J. M. C. 199; *sub nom. R. v. Trafford*, 15 Q. B. 200.

(*b*) *R. v. Hammond* (1850), 4 New Sess. Cas. 316.

passed, the powers conferred on quarter sessions by 12 & 13 Vict. c. 45, do not therefore apply to special sessions. As to power of quarter sessions on appeal from special sessions to give costs of both appeals, see p. 480.

The appeal must be lodged at the next practicable quarter sessions after publication of the rate(c); for it is by the assessment that the party is "aggrieved," and against that he appeals; but an appeal before such allowance is premature. By "practicable" is meant the next session for which the appellant is in time to give an effectual notice of appeal after publication of the rate. If, from a refusal of a copy of the rate, or its late publication, only one day intervenes between its publication and the next immediate quarter sessions, the appellant is not bound to lodge his appeal then(d). An appellant is entitled to a reasonable time, before giving notice of appeal, to allow of his considering whether he shall appeal, and the grounds on which his appeal shall be based(e). Where for practical convenience a county is divided into distinct divisions, and a distinct court is held in each division by adjournment from one to the other, the notice of appeal may be lodged at the adjourned sessions where the practice of sessions permits of that course(f); but the appellant is not bound so to enter it(g). Yet, if sufficient notice of appeal has not been previously given, or if any other sufficient reason appear to postpone the hearing, the court shall respite it to the following sessions(h); and where it was the practice of a session to allow appeals against poor's rates to be entered at the sessions immediately following the publication, but adjourned as a matter of course to the next sessions, though there had been sufficient time for giving notice of appeal, and preparing for trial at the first sessions, and an appellant had acted on that practice, the Court of King's Bench declined to sanction the refusal of the sessions to hear the adjourned appeal(i). If an appeal be entered at

Of appeals to quarter sessions.

As to respiting appeals to quarter sessions.

(c) 17 Geo. 2, c. 38, s. 4. And where general sessions are held, as well as general quarter sessions, and distinct from them, as in London and Middlesex, the appeal must be to the next general quarter sessions: *R. v. Justices of London* (1812), 15 East, 632. The regularity of the publication in church, or the reverse, will not be inquired into in the King's Bench on a case reserved, if it was not intended to be referred: *R. v. Aire and Calder Navigation* (1824), 2 T. R. 660.

(d) *R. v. Justices of Sussex* (1812), 15 East, 206; *R. v. Hendon* (1822), 2 D. & R. 249.

(e) *R. v. Justices of Surrey* (1880), 6 Q. B. D. 100.

(f) *R. v. Justices of Sussex* (1797), 7 T. R. 107; *R. v. Justices of Sussex* (1865), 34 L. J. M. C. 69.

(g) *R. v. Justices of Surrey* (1813), 1 M. & S. 479.

(h) 17 Geo. 2, c. 38, s. 4.

(i) *R. v. Justices of Wilts* (1828), 8 B. & C. 380.

the first sessions after the publication of the rate, and notice under 17 Geo. 2, c. 38, s. 4, is not given, the appellant is entitled to have his appeal entered and respited (*k*); but if there be a notice of appeal in fact, it is for the sessions to exercise their judgment and discretion as to whether it is a reasonable notice, and if they adjudge it to be so, it is for them to exercise their discretion as to whether they will adjourn or dismiss the appeal (*l*).

SECTION 3.

OF THE CONDITIONS OF APPEAL AGAINST POOR RATES OUTSIDE THE METROPOLIS—AS NOTICE, PARTIES TO THE APPEAL, &c.

Notice of
appeal.

Although an appeal against a poor's rate may be received and adjourned (*viz.*, entered and respited) without the previous notice required by the sessions practice, it cannot be *heard* and adjudicated on, except by consent of the parties, without proof of there having been duly served on the respondents such a notice for trial at the second sessions; and if it has once been previously respited, it may be altogether dismissed for that defect (*m*).

Form of
notice.

The notice, by the express provisions of 41 Geo. 3, c. 23, s. 4, must be in writing, "signed by the person or persons giving the same, or his, her or their attorney, on his, her or their behalf"; and must specify "particular causes or grounds of appeal," on which he proposes to rely. Thus, if the ground of appeal be that particular persons are omitted, they must be specified in it by name (*n*). So a rate cannot be quashed for a material defect apparent on the face of it, *e.g.*, for not describing the property in respect of which the party is rated, unless it be stated in the notice as a ground of appeal (*o*).

Notice by
whom.

The notice must be given by the party "grieved by the rate or assessment, or having any material objection to any

(*k*) *R. v. Eyre* (1857), 26 L. J. M. C. 14; and see now *R. v. De Grey*, [1900] 1 Q. B. 521, in which case *R. v. Justices of Kent* (1899), 80 L. T. N. S. 622, is disapproved and not followed.

(*l*) *R. v. Eyre* (1857), 26 L. J. M. C. 121.

(*m*) *Ibid.* 125; 41 Geo. 3, c. 23, s. 5.

(*n*) 41 Geo. 3, c. 23, s. 6.

(*o*) *R. v. Bromyard* (1828), 8 B. & C. 240.

person or persons being put on or left out of such rate or assessment, or to the sum charged on any persons therein" (*p*). Nothing prevents persons grieved by the same rate from joining in the same appeal, whether their grounds of appeal be the same or different (*q*). If the appellant show on the face of his notice of appeal a material objection to the rate, it is sufficient, though he does not in terms allege that he is a party grieved, or a rated inhabitant; but if on the trial of the appeal he appears to be a mere stranger, the sessions may refuse to hear him (*r*).

By the 2nd section of the 27 & 28 Vict. c. 39, the assessment committee of a union formed under 4 & 5 Will. 4, c. 76, may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to such appeal, but in the name of the guardians of such union, in like manner, and with the same incidents, and subject to the same liabilities and entitled to the same remedies and rights, as in the case of persons other than the overseers to whom notice of appeal may be given. Assessment committee may be respondents.

Under this section an assessment committee who have been respondents on an appeal to special sessions, may appeal to quarter sessions under 6 & 7 Will. 4, c. 96, s. 6 (*s*).

By 27 & 28 Vict. c. 39, it is enacted, in sect. 1, that "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for every parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union: provided that no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of and no subsequent list has been transmitted to them; and if they amend the same, shall give notice of Notice of appeal to be given to the assessment committee.

Notice of objection to the valuation list.

(*p*) 17 Geo. 2, c. 38, s. 4.

(*q*) *R. v. Justices of Sussex* (1812), 15 East, 206.

(*r*) So decided on an appeal against overseers' accounts given by the same words and section: 41 Geo. 3, c. 23, s. 4; *R. v. Justices of Somersetshire* (1827), 7 B. & C. 681.

(*s*) *Guardians of Llanidloes v. Pryce Jones* (1881), 44 L. T. N. S. 310; *sub nom. R. v. Justices of Montgomeryshire*, 50 L. J. M. C. 52; *sub nom. Guardians of Newtown v. Pryce Jones*, 45 J. P. 407.

Service of
notice.

such amendment to the overseers, who shall thereupon alter their current rate accordingly."

The notice to the committee may, by sect. 42 of the Union Assessment Committee Act, 1862, be served upon the committee by being left at the office of the clerk to the board of guardians or sent through the post office, addressed to the committee at such clerk's office, or by being delivered personally to their clerk or at his usual place of abode.

In the case of *R. v. Justices of Denbighshire*, decided in the year 1885 (*t*), it was held that a person who has once given the assessment committee notice of objection against a valuation list and failed to obtain such relief as he deems just, may appeal to quarter sessions against any subsequent poor rate made in conformity with the list, and 27 & 28 Vict. c. 39, s. 1, does not make it a condition precedent of such appeal that previously thereto he should repeat his application to the committee for relief (*t*).

Objection
before
assessment
committee
condition
precedent
to appeal.

But in the most recent decision (*u*) on the point the various cases are distinguished, and the decision in *R. v. Justices of Derbyshire* is held to be only: "that where a rate is made which is the first effective rate after you have gone before the assessment committee and failed to obtain the relief you asked for, then you can appeal against that rate without going a second time before them." And where a person has objected before the assessment committee of the union to his assessment in the valuation list and having failed to obtain relief has appealed to sessions, then it becomes a condition precedent to his right to appeal against a subsequent rate made in conformity with the same list that he should again have given the notice of his objection to the valuation list required by sect. 1, c. 39, of 27 & 28 Vict., and have failed to obtain relief from the assessment committee (*u*). The giving of the notice of objection to the assessment committee and the failure to obtain relief are conditions precedent to the hearing of an appeal by the sessions, even although the objection was not to the valuation of the property but to its rateability (*x*).

Notice of
objection
condition
precedent.

Next practicable sessions,
what.

Where the appeal is brought to special sessions under sect. 6 of the Parochial Assessment Act, 1836, upon a poor rate being made in a rural parish having a parish council, it is now, since the passing of the Local Government Act, 1894 (see sect. 5 (2) (b) and sect. 6 (c) (1)), a condition precedent to

(*t*) *R. v. Justices of Denbighshire* (1885), 15 Q. B. D. 451; and see also *R. v. Justices of Wiltshire* (1879), 4 Q. B. D. 326. Both cases can be distinguished from *R. v. Great Western Rail. Co.* (1869), L. R. 4 Q. B. 323.

(*u*) *R. v. Justices of Essex*, [1902] 1 K. B. 180.
(*x*) *R. v. Justices of Lancashire* (1874), 43 L. J. M. C. 116; *sub nom. Overseers of Salford v. Justices of Salford*, 30 L. T. N. S. 403.

the jurisdiction of the justices to hear the appeal that the appellant should have given notice of appeal to the parish council (*y*).

As to what are the next sessions under 17 Geo. 2, c. 38, s. 4, it has been held that one day's interval between publication of rate and date of giving notice of appeal is insufficient, and an appellant is entitled to a reasonable time before giving notice of appeal (*z*); but it has been held that six days is a sufficient interval, and an appeal not entered then is entered too late and out of time (*a*).

The length of notice to be given to respondents other than the assessment committee is governed by 12 & 13 Vict. c. 45, s. 1, which enacts that in cases of appeals against poor rates to any court of general or quarter sessions, "fourteen clear days' notice of appeal at least shall be given, and such shall be sufficient notice, any Act or Acts, or any rule or practice of any court or courts to the contrary notwithstanding; and such notice of appeal shall be in writing, signed by the person or persons giving the same, or by his, her or their attorney on his, her or their behalf, and the grounds of appeal shall be specified in every such notice: provided always, that it shall not be lawful for the appellant or appellants on the trial of any such appeal to go into or give evidence of any other ground of appeal besides those set forth in such notice."

Notice other than to the assessment committee.

Notice to be in writing and signed.

This notice must be "delivered to or left at the places of abode of the churchwardens and overseers of the poor of the parish, township, vill, or place, or any two of them" (*b*); and if the appeal be brought, "because any other person or persons is or are rated or assessed in such rate or assessment, or is or are omitted to be rated or assessed therein, or is or are rated or assessed in any such rate or assessment at any greater or less sum or sums of money than the sum or sums at which he, she, or they ought to be rated or assessed therein, or for any other cause that may require any alteration to be made in any rate or assessment with respect to any other person or persons," then the person so appealing for the causes aforesaid, or any of them, shall give such notice of appeal in writing as herein-before mentioned, not only to the churchwardens or overseers of the poor, or any two or more of them, but also to the other person or persons so interested or concerned in the event of such appeal as aforesaid (*c*).

This direction makes it imperative on an appellant to serve

(*y*) *R. v. Justices of Tewkesbury*, [1903] 1 K. B. 39.

(*z*) *R. v. Justices of Surrey* (1880), 6 Q. B. D. 100.

(*a*) *Liverpool Gas Co. v. Overseers of Everton* (1871), L. R. 6 C. P. 414; *sub nom. R. v. Liverpool*, 23 L. T. N. S. 813.

(*b*) 41 Geo. 3, c. 23, s. 4.

(*c*) *Ibid.*

a proper notice of appeal on every party whom he contends to have been under-rated, or improperly omitted from the rate (*d*), and they are the respondents. But if the ground of the complaint is that the appellant is over-rated in respect of *all* the other parties rated, it is unnecessary to give notice to them, for the alteration sought is only the diminution of the assessment, and the rest of the rate remains entire (*e*).

The position of the churchwardens and overseers is changed since the passing of the Local Government Act, 1894 (56 & 57 Vict. c. 73).

By sect. 5, sub-sect. 2 (b), in every rural parish having a parish council, references in any Act to the churchwardens and overseers shall as respects any rural parish, except so far as these references relate to the affairs of the church, be construed as references to the overseers; and by sect. 6 (c) (1), upon the parish council of a rural parish coming into office, there shall be transferred to that council the powers, duties and liabilities of the overseers or of the churchwardens and overseers of the parish with respect to appeals or objections by them in respect of the valuation list, or appeals in respect of the poor rate, or county rate, or the basis of the county rate.

To whom
notice to be
given.

The question upon what persons it is necessary to serve notice of appeal may therefore be summed up as follows:—

(1) Upon the assessment committee, under 27 & 28 Vict. c. 39, s. 1, *ante*, p. 579.

(2) If the appeal be brought because any person is alleged to be omitted from the rate, or wrongfully included, or over or under rated then upon such person, under 41 Geo. 3, c. 23, s. 4, *ante*, p. 581.

(3) By the same section notice must be given to the churchwardens or overseers of the poor or any two of them.

(1) But by the provisions of sect. 5 of the Local Government Act, 1894 (56 & 57 Vict. c. 73), *supra*, in rural parishes having a parish council the churchwardens cease to be overseers; and by sect. 6 the powers, duties, and liabilities of the overseers are transferred to the parish council, and in that case it is the parish council which is to be served.

(2) In a rural parish not having a parish council the parish meeting may apply to the county council under the provisions of sect. 19, sub-sect. 10, of the Local Government Act, 1894, and the council may confer on the parish meeting any of the powers conferred on a parish council by that Act. If any such order has been made, it must depend on the terms of it whether

(*d*) *R. v. Eyre* (1857), 26 L. J. M. C. 121; *R. v. Brooke* (1829), 9 B. & C. 915.

(*e*) See *R. v. Justices of Suffolk* (1818), 1 B. & A. 640.

the parish meeting take the place of the overseers; if no order is made the overseers remain the persons to be served.

- (3) In a municipal borough, including a county borough or any other urban district, the council may apply to the Local Government Board under the provisions of sect. 33, sub-sect. 1, of the Local Government Act, 1894, for an order conferring on the council or some other representative body (*inter alia*) any powers, duties, or liabilities of overseers, and any powers, duties, or liabilities of a parish council.

It depends upon the order made whether the council or other representative body take the place both of the churchwardens and overseers or of either body. If no order is made the churchwardens and overseers remain the respondents to be served.

Proof of the notice of appeal may be waived; for “with the consent of the overseers, signified by them or their attorney in open court, and with the consent of any other person interested therein, the said court of sessions may proceed to hear and decide upon such appeal, although no notice thereof shall have been given in writing, and with like consent may hear and decide on grounds of appeal not stated or misstated in such written notice, where any notice shall have been given in writing” (*f*); but, except in compliance with the provisions of the above statute, the service of notice will not, except on very clear grounds, be dispensed with (*g*). Again, if the appeal was respited at the instance of the respondents, the appellant is entitled at the following sessions to be heard without proving any notice of appeal (*h*); but a respite at the instance of the appellant would not waive the necessity of proof of the original notice (*i*); but whether the respondents, by consenting to the entry, respiting or adjournment of an appeal, do by that act alone waive the objection to the notice, may depend upon the circumstances under which the consent is given.

Waiver of
notice of
appeal.

The general provisions of the 12 & 13 Vict. c. 45, s. 3, curing defects in form in grounds of appeal, and giving power to amend the same, apply to grounds of appeal against a poor's rate; as also does sect. 4, relating to the costs occasioned by frivolous grounds of appeal; and sect. 6, making the decisions of sessions final on such matters.

If the rate is made in conformity with the valuation list, notice of objection to the valuation list must be given to the assessment committee in the first place, and there must be a

(*f*) 41 Geo. 3, c. 23, s. 5.

(*g*) *R. v. Sheard* (1824), 2 B. & C. 856.

(*h*) *R. v. Justices of Herts* (1833), 4 B. & Ad. 561.

(*i*) *R. v. Justices of West Riding* (1833), 5 B. & Ad. 667.

failure to obtain relief from that committee. There must also be twenty-one days' notice of appeal to the assessment committee, as well as the notice of appeal to the parish officers, and, in cases within 41 Geo. 3, c. 23, to the persons interested (*k*).

Form of a Notice of Appeal against a Poor Rate (l).

To J. M. churchwarden, and to W. P. and J. H. the late overseers, and H. A. and W. P. the present overseers of the poor of the parish of C. in the county of N., and to each and every of them. To A., B., C. and D., I do hereby give you notice that I intend at the next general quarter sessions of the peace to be holden in and for the county of N. at N., on Thursday, the 13th day of April instant, to enter and try an appeal [*or if the appeal has been already entered and respited*, to try a certain appeal lodged and entered at the last general quarter sessions of the peace holden at N. aforesaid in and for the county aforesaid], against a certain rate or assessment intituled [*copy the title of the rate*], for the following (amongst other) particualr causes and grounds of appeal:—

1st. Because the said rate or assessment has not been made, published and allowed in due course of law.

2nd. Because the rate is made for other purposes than for the relief of the poor.

3rd. Because I am assessed at too large a sum in an unfair proportion, in comparison with the sum and proportion assessed on A., B., C. and D., or one of them.

4th. Because I am assessed at a greater sum than I ought to be assessed at.

5th. Because the persons hereinbefore named, or some of them, are assessed at less sums than they ought to be assessed at.

6th. Because the said persons are not assessed at all for lands and houses which were in their occupation when the said rate was made.

7th. Because the said persons, or some of them, are not assessed to the full value of their local visible property within the said parish.

8th. Because I am assessed for property which was not in my occupation at the time of the making the said rate, and for other property which is not liable to be assessed to the relief of the poor.

9th. Because it does not sufficiently appear on the said rate what persons thereby assessed are charged.

10th. Because certain persons are assessed for parts of certain farms, houses and lands, but such parts are altogether uncertain and indefinite.

11th. Because it does not appear whether the persons assessed are charged as occupiers of land, &c., or as inhabitants.

12th. Because the profits of the property for which I am assessed are devoted to public purposes, and there is no beneficial occupier.

(*k*) 27 & 28 Vict. c. 39, s. 1; see p. 581.

(*l*) See this form: *R. v. Brooke* (1829), 9 B. & C. 915.

13th. Because I am not an occupier of any land, house, tithes impropriate, appropriation of tithes, mine, rights of fowling, shooting, taking game or rabbits, or fishing, or land used as a plantation or wood, or valuable underwood in the said parish.

14th. Because it does not appear in and by the said rate or assessment in respect of what property the said rate is made and assessed on me, the appellant.

And, lastly, because the rate and assessment is in other respects illegal, unequal, partial, oppressive and unjust.

And I hereby give you the said churchwardens and overseers notice, to produce at the hearing of the said appeal the said pretended rate or assessment, and all other rates and assessments made for the relief of the poor of the said parish for the twenty years last preceding the date hereof; likewise the valuation list for the said parish and certain valuations made by J. L., J. C. and T. B., some or one of them, and every other valuation made by the direction of any vestry or any churchwardens and overseers of the said parish; and that you, A. B., C. and D. respectively produce all deeds, leases, agreements, admissions and other documents respecting or concerning the premises, for which you and each of you, are jointly or severally rated or assessed, or appear so to be, in and by the said rate or assessment, or omitted to be, therein rated or assessed.

Witness my hand this — day of March, —.

R. B. B.

In cases of warrants of distress for poor rates issued by justices no appeal lies to quarter sessions against the issue of the warrant until a levy has taken place under it, it being adjudged that it is not until there has been a levy under the warrant that the person whose goods are seized becomes a party aggrieved (*m*). Appeal against warrant of distress after levy.

The following notice of appeal against a distress for rates has been used:—

To the justices of the petty sessional division of — in the county of —.

To A. B., Esquire, C. D., Esquire, and E. F., Esquire, three of the justices for the said petty sessional division.

To G. H., Esquire, the clerk to the justices of the said petty sessional division, and

To the overseers of the poor of the parish of — in the said county of —.

Whereas you the said A. B., Esquire, C. D., Esquire, and E. F., Esquire, sitting as a court of summary jurisdiction on the — day of —, upon the complaint of the overseers of the poor of the parish of — that the — being rated and assessed to the relief of the poor and to the special expenses chargeable under the Public Health Acts of the said parish in and by the rates in the schedule to that complaint and in the summons issued against the said —, to wit, a poor

(*m*) *R. v. London JJ.*, [1899] 1 Q. B. 532.

rate made on ———, ———*l.*, and a special expenses rate made on the ———, ———*l.*, total ———*l.*, had not paid the said sum or any part thereof, but had refused so to do, made an order directing a warrant of distress to issue against the goods of the said ———. And whereas such warrant of distress has been issued in accordance with the said order and direction and distress against the goods of the said ——— has been levied in pursuance thereof. And whereas the said ——— are aggrieved by such distress. Now take notice that the said ——— do intend to appeal to the next general quarter sessions of the peace to be holden in and for the said county of ——— at ——— against the levying of the said distress upon the following grounds, namely:

1. That the decision of the said justices to direct the issuing of the said warrant of distress was against the weight of evidence.

2. That the said ——— did not owe the money alleged to be due in the said complaint and the said summons.

3. That the said ——— had, prior to the issue of the summons, paid the said sum of ——— claimed therein.

4. That the said ——— had, prior to the issue of the said summons, paid the whole of the poor and special rates made on the ———.

5. That the order directing the issue of the said warrant of distress and the distress consequent upon such order are bad and not supportable in law.

Dated this ——— day of ———.

The ground of decision in *R. v. London JJ.* (m) was that the appeal against the issue of a distress warrant for poor rates is given only by sect. 7 of 17 Geo. 2, c. 38, which clearly gives the appeal against the distress only.

That section is in the following terms:—

“And for the more effectual levying money assessed for the relief of the poor, be it enacted, &c. that the goods of any person assessed, and refusing to pay, may be levied by warrant of distress, not only in the place for which such assessment was made, but in any other place within the same county or precinct; and if sufficient distress cannot be found within the said county or precinct, on oath made thereof before some justice of any other county or precinct (which oath shall be certified under the hand of such justice on the said warrant), such goods may be levied in such other county or precinct by virtue of such warrant and certificate; and if any person shall find him or herself aggrieved by such distress as aforesaid, it shall and may be lawful for such person to appeal to the next annual or quarter sessions of the peace for the county or precinct where such assessment was made, and the justices there are hereby required to hear and finally determine the same.”

It was unsuccessfully contended in that case by counsel in support of the rule *nisi*, which had been granted for a mandamus to the North London Sessions, who had refused to

(m) *R. v. London JJ.*, [1899] 1 Q. B. 532.

entertain an appeal against the issue of a distress warrant before levy, that sect. 7 of 17 Geo. 2, c. 38, only applied to an appeal in the case of a distress warrant being levied outside the jurisdiction of the justice who issued it. The argument was that, under 43 Vict. c. 2, s. 6, an appeal already lay against the *issue* of the warrant, ^{and}_{or} against the levy under it, at any place within the jurisdiction of the issuing justice, to the quarter sessions having jurisdiction in such place of issue, ^{and}_{or} levy, and that sect. 7 of 17 Geo. 2, c. 38, gave an additional right of appeal against the levy where the levy took place in another jurisdiction.

It was contended that if sect. 7 of 17 Geo. 2, c. 38, which gave the right to levy distress warrants in another county, had not gone on to give an appeal in such a case, the defendant whose goods were levied upon under a warrant wrongly issued might have been without redress by way of appeal. The quarter sessions of the county in which the levy was made would have had no jurisdiction to hear the appeal, for the rate and the warrant issued to enforce payment of it were alike made and issued in another jurisdiction by persons and upon grounds over whom and in respect of which such court could not entertain jurisdiction. If, on the other hand, the aggrieved person had gone to the quarter sessions of the issuing county, he would have probably been met by the objection that the levy took place under the authority of the justice of the other jurisdiction who backed the warrant, and that the Court had no jurisdiction to entertain appeals as to matters transacted outside their own jurisdiction. Lapse of time might have barred an appeal against the original issue of the warrant. The Editors submit that the decision in this case cannot be regarded as wholly satisfactory, inasmuch as it is exceedingly inconvenient that the propriety of the issue of a distress warrant cannot be tested upon appeal until a levy has taken place thereunder. They venture to express the hope that the point decided by *R. v. London JJ.* may some day receive reconsideration.

Notice of Appeal against Poor Rate.

[Such of the following grounds of appeal should be selected for use as apply to the facts upon which the appeal is based :—]

To the assessment committee of the ———, in the county of ———, See *ante*,
and to ———, Esquire, of ———, and to ——— and ———, p. 582.
the overseers of the parish of ———, *or*

To the parish council of ———, *or*

To the parish meeting of ———, *or*

To the council of the borough of ———.

Whereas we, ———, being rated as occupiers of certain lands and premises situate in the parish of ———, in the rate hereinafter men-

tioned, described as follows, namely, — (all of which said lands and premises are hereinafter called the said premises), and such rate or assessment being an assessment for the relief of the poor and other expenses of the guardians in the parish of —, in the —, and alleged to be made on the — day of —, and we, the said —, feeling aggrieved by the said rate and assessment, gave due notice in writing of the grounds of our objection and appealed to and appeared before you, the above-named assessment committee, but failed to obtain from you such relief as we deemed just. Now, therefore, take notice, and we do hereby give notice to you and to each and every of you, that we intend at the next general quarter sessions of the peace, to be holden at —, in and for the —, to enter, prosecute, and try [*or if already entered and respited to prosecute and try*] an appeal against the said rate or assessment, and against the decision of you, the above-mentioned assessment committee, in relation thereto, and that our grounds and causes of appeal are:—

1. That the name and situation of the property in respect of which we are rated as aforesaid, and the estimated extent thereof, are omitted to be described and specified in the said rate or assessment.

2. That at the date of the making of the said rate we had no property neither have we now any property in the said parish.

3. That we are overrated as regards the gross estimated value and net annual value of the rateable property alleged to be occupied by us in the said parish.

4. That we are not rated or assessed in respect of the said premises in conformity with the rules and principles of rating which are laid down by law as applicable to the rating of premises of the character occupied by us.

5. That in comparison with the rating of other premises in the same parish as, and similar in character to, those occupied by us we are over-rated and over-assessed, and that the principle on which the said premises have been rated and assessed is erroneous, and is incorrect and different from that on which other and similar property in the said parish is rated and assessed.

6. That the provisions of sect. 15 of the Union Assessment Act, 1862, and of sect. 1 of 6 & 7 Will. 4, c. 96, have not been complied with in making the estimated gross rental of the premises contained in the valuation list of the said parish, and such gross rental in the valuation list is larger than it would have been had such provisions been complied with.

7. That the said rate is not made upon an estimate of the net annual value of the premises as required by the provisions of sect. 1 of 6 & 7 Will. 4, c. 96.

8. That the said rate is not made upon an estimate of the rent at which the premises might reasonably be required to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rentcharge, if any, and after deducting therefrom the probable average annual cost of repairs, insurance and other expenses, if any, necessary to maintain the premises in a state to command such rent as required by sect. 1 of 6 & 7 Will. 4, c. 96.

9. That we are rated in respect of machinery, stock-in-trade and other property not by law rateable.

10. That the said rate or assessment has not been made, allowed or published as required by law.

11. That the said rate or assessment is bad upon the face of it and is not made in accordance with the provisions of sect. 2 of 6 & 7 Will. 4, and the form of such rate is not in accordance with the form provided by the schedule to such Act and does not contain the particulars thereby required.

12. That the overseers or other officers or persons or bodies whose duty it might be to make and levy the said rate did not sign the declaration required by sect. 2 of 6 & 7 Will. 4, c. 96, to be signed by them before the said rate was allowed by the justices.

13. That the overseers did not comply with the provisions of sect. 14 of the Union Assessment Committee Act, 1862, inasmuch as they did not within the time in that section specified, make the valuation list therein mentioned, or revise such list, or sign it.

14. That the persons who prepared the said valuation list alleged to be in force for the said parish were not overseers or properly or legally authorised persons within the provisions of sects. 14 and 16 of the Union Assessment Committee Act, 1862.

15. That the provisions of sect. 17 of that Act were not complied with inasmuch as the valuation list was not deposited at the proper place, and a copy of such valuation list was not delivered as by the section provided, and notice was not given as required [*or* not given for the time required by sect. 17] and opportunity was not given of inspecting the list as required, and persons were not allowed to take copies of or extracts from such list, and the said list was not transmitted to the committee within the period of time mentioned in the section, nor were overseers or rate-payers without the union permitted to inspect it or take copies or extracts from the list.

16. That the committee failed to give notice of meetings as required by sect. 19 of the Union Assessment Committee Act, 1862, nor did they hold such meetings, nor did the overseers publish the notices required by that section.

17. That alteration and insertions and corrections were made in the valuation list, but were not made at the time or in the manner provided by sect. 20 of the said Act.

18. That the approval of the said valuation list was not in the manner prescribed by sect. 20 of the said Act.

19. That the valuation list having been altered was not deposited for inspection, nor was notice given, nor was a day appointed for the hearing of objections.

20. That the valuation list so altered was not approved in the manner prescribed by sect. 20 of the said Act.

21. That the valuation list upon which the said rate or assessment is based was not and is not the valuation list in force within the meaning of sects. 24 and 28 of the said Act.

22. That new or supplemental valuation lists became necessary but

were not prepared by the overseers as provided by sects. 25 and 26 of the said Act. .

23. That the provisions of sect. 27 of the said Act were not carried out in respect of such new or supplemental valuation list.

24. That the said rate or assessment is not made in accordance with the approved valuation list in force as provided by sect. 28 of the said Act.

25. That the provisions of sect. 4 of the Union Assessment Committee Act, 1864, have not been complied with inasmuch as the valuation of the valuer is not in writing and does not show the particulars of the several hereditaments comprised therein, or the amounts at which he has valued the same accordingly, it is not signed, nor has the same been open to inspection or for the taking of copies or extracts as in that section provided.

26. That if machinery and plant contained in and upon the said premises were liable to be rated or to be taken into consideration for the purpose of estimating the gross annual value of the said premises in the method adopted by the overseers and approved by you the assessment committee, no sufficient allowance or deduction has been made for the average annual cost of repairs, insurance and other expenses necessary to maintain the said premises with the said machinery and plant in a state to command the gross annual value at which the same are estimated in the said valuation list. And take notice that we require you to produce at the said sessions on the hearing of the said appeal the hereinbefore mentioned rate or assessment, and also the valuation list or valuation lists upon which the said rate or assessment for the relief of the poor of the said parish is based, and all the valuation lists alleged to be in force or made at the date of this notice, together with all valuations, overseers' books, vestry books, and all other books, accounts and documents whatsoever, including the minute book of the board of guardians and the assessment committee, in which the several proceedings of the said poor law union and of the overseers of the said parish with respect to the last past and present rating or assessment of the said premises occupied by us, or of any other similar premises, to the relief of the poor of the said parish, have been or should have been entered, and further this our notice of appeal.

SECTION 4.

OF THE CONDITIONS OF APPEAL WITHIN THE METROPOLIS— NOTICE, &c.

The practice with regard to rating appeals in the metropolis is now regulated by the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67).

By sect. 32 of that Act any ratepayer and any surveyor of taxes, and any overseer with the consent of the vestry of his parish, who may feel aggrieved by any decision of the assessment committee, on an objection made before them to which he was a party, or by any decision of special sessions, whether he was a party or not, may appeal against such decision to the assessment sessions—any assessment committee in the metropolis, or in the county in which the parish to which the appeal relates is situate, any overseers in the metropolis or such county, with the consent of the vestry of their parish, any ratepayer in the metropolis or such county, and any body of persons authorized by law to levy rates or require contributions payable out of rates in the metropolis, or such county may appeal to the assessment sessions if they or he feel aggrieved by reason—

Who may
appeal.

- (1) of the total of the gross value of any parish being too high or too low ;
- (2) of the total of the rateable value of any parish being too high or too low ;
- (3) of there being no approved valuation list for some parish.

By the Local Government Act, 1888, s. 42 (10), the quarter sessions for the county of London shall be substituted for the general assessment sessions under the Valuation (Metropolis) Act, 1869, and have all the jurisdiction vested in those sessions, and shall exercise the same within the same area. Upon the hearing of any appeals in relation to property in the city of London, such two members of the court of quarter sessions of the city of London as may be appointed by that court for the purpose, shall be entitled to attend and sit as members of the quarter sessions for the county of London.

Assessment
sessions
replaced by
London
county
quarter
sessions.

Special powers were given by sect. 26 of the Valuation (Metropolis) Act, 1869, to the assessment sessions created by that Act. Those sessions have now been superseded by the quarter sessions for the county of London (see sect. 42 (10) of the Local Government Act, 1888, quoted above); but it is doubtful how far the special powers reserved to the assessment sessions are applicable to the county of London quarter sessions; but for a full discussion of these points the reader is referred to Ryde on Rating, p. 615 *et seq.*

By sect. 42 (13) of the Valuation (Metropolis) Act, 1869, the justices may hold the assessment sessions at any time after the 1st February in the year in which the valuation list is made, which will enable them to determine all appeals (except where a valuation list or valuation is ordered) before the ensuing 31st of March. It has been decided (a) that the court of quarter sessions are in the same position as the assessment sessions with regard to the restric-

Quarter
sessions, when
to be held.

(a) *R. v. Justices of the County of London and London County Council*, [1893] 2 Q. B. 476, not overruled on this point in the House of Lords.

tions as to the time for hearing appeals, but if notice of appeal has been given in due time and the hearing is prevented only by the difficulties of the court itself, and the court is unable to cope with its business, that is not a sufficient ground to prohibit the magistrates from hearing the appeal (*b*).

London
County
Council
quarter
sessions
scheme.

By sect. 29, the justices had power to fix places in the metropolis where the appeals relating to each parish in the metropolis are to be heard. By sect. 42 (7) of the Local Government Act, 1888, the London County Council had power to make a scheme for regulating the holding of quarter sessions. The scheme will be found in Appendix C.

Notice of
appeal.

By sect. 42 (12) of the Valuation (Metropolis) Act, 1869, notice of appeal to assessment sessions shall be given on or before the 14th of January in the year in which the valuation list is made.

What notice
must contain.

By sect. 33 the notice must be in writing, and must specify the correction which the appellant desires to have made in the valuation list, and must be served on the following persons, namely, in all cases on the surveyor of taxes of the district to which the appeal relates, and on the clerk of the assessment committee which approved the list wholly or partly questioned by the appeal; when the appeal relates to the unfairness or incorrectness of the valuation of, or to the omission of an hereditament occupied by any person other than the appellant, or to the incorrectness of any matter stated in the list with respect to any such hereditament, then on such person: if an assessment committee or a surveyor of taxes is the appellant, then also on the overseers of the parish to which the appeal relates. Provided that it shall not be necessary to serve any notice of appeal on the surveyor of taxes in any case in which the appeal relates only to the rateable value of any hereditament. The clerk of the assessment committee on receiving notice of an appeal, shall forthwith serve notice thereof on the clerk of the assessment sessions.

Notices, how
served.

By sect. 65 all orders and notices under this Act shall be in writing or print, or partly in writing and partly in print, and those required to be served on any person or body of persons corporate or incorporate, may be either delivered to such person or the clerk of such body, or left at the usual place of abode of such person or clerk, or at the office of such clerk or body, or (if such abode or office cannot on reasonable inquiry be discovered) at the premises to which the order, notice, or document relates. They may also be sent by post, and shall be deemed to have been served and received respectively at the time when the same would have been received in the ordinary course of post.

Orders of the county of London quarter sessions (dated

(*b*) *R. v. Justices of the County of London and London County Council*, [1893] 2 Q. B. 476.

1898) have been made with respect to the Valuation (Metropolis) Act, 1869.

By Ord. III., on an appeal to quarter sessions from the decision either of an assessment committee or of special sessions, the appellant and two sureties shall, within seven days after giving notice of appeal, enter into recognizances before a justice of the peace for the county conditioned for the due prosecution of the appeal, and for the payment of any costs ordered by quarter sessions to be paid by the appellant, and the amount of such recognizances shall be determined by such justice, having regard to the nature of the appeal, so that the amount be not less than 50*l*.

Appellant to enter into recognizances:

By Ord. IV., in lieu of entering into the recognizances prescribed by Ord. III., the appellant may, within the same period, pay into the London and Westminster Bank (Head Office) to a joint account in the names of the chairman of the court and the clerk of the court, the sum of 50*l*., and the receipt given by the bank for such payment shall be deposited with the clerk of the court and shall be filed by him in proof of payment. Before making such payment, a præcipe shall be obtained from the clerk of the court.

Or deposit 50*l*.

By Ord. V., Ords. III. and IV. shall not apply to assessment committees, overseers, or surveyors of taxes.

By Ord. VI. appeals to quarter sessions shall be entered by lodging with the clerk of the court, on or before the 14th January, a copy of the notice of appeal.

Entry of appeals.

By sect. 34 of the Valuation (Metropolis) Act, 1869, the justices in "assessment sessions" shall, in open court, hear and determine all appeals brought before them. They may adjourn the hearing from time to time, and to any day not later than the day before which all appeals to them are required by this Act to be heard(c) . . . and if from accident or mistake due notice of appeal has not been given, or if an additional notice of appeal appears to be required, they may, if they think it just, order notice to be given.

Powers of trustees on the hearing.

By Ord. VII. of the Orders of County of London Sessions, in an appeal to quarter sessions, the person or persons claiming to appear as respondents, shall give notice in writing of his or their intention to appear, and shall state in the notice whether he or they intend to appear separately, or as joint respondents with any other person or persons; and such notice shall be delivered to the clerk of the court, and served on the appellant, within fourteen days after the time limited by Ord. VI. (see *supra*) for the entry of the appeal, and the person or persons omitting to give such notice shall not be heard, unless by special leave of the court, until he or they

Respondents must give notice.

(c) But see *R. v. Justices of the County of London and London County Council*, [1893] 2 Q. B. 476.

shall have given such notice, or complied with such terms as the court may think fit to direct or impose. The expression "person or persons" in this order shall extend to and include a ratepayer, an occupier, a surveyor of taxes, an assessment committee, overseers, and any body of persons authorised by law to levy rates, or require contributions payable out of rates.

Appellant
and respon-
dent must
state case.

By Ord. VIII. on or before February 1st next following the entry of an appeal to quarter sessions the appellant shall state his case, and the facts to be proved, and the points of law (if any) to be argued in support of the case, and shall deliver to the clerk of the court ten copies thereof for the use of the court, and shall serve one copy on each respondent; and in like manner each respondent shall, on or before the same day, state his case, and the facts to be proved, and the points of law (if any) to be argued in support of the case, and shall deliver in like manner ten copies thereof for the use of the court, and shall serve one copy on the appellant. Provided that this order shall not apply to an appeal in which the total rateable value appealed against does not exceed 300*l*.

Notice of
motion.

By Ord. XII. notices of motion to quarter sessions shall be served two clear days before the court is moved, and by Ord. XIII. applications required to be made and consents required to be given at quarter sessions shall be made and given by counsel in open court.

Costs.

By sect. 39 of the Valuation (Metropolis) Act the costs of any appeal, including the costs of any valuation [see sects. 37 and 38], shall be in the discretion of the justices in assessment sessions, and shall be awarded by them to be paid by such parties to the appeal, and in such proportions, as they think just. Costs so ordered to be paid may be recovered as if they had been awarded by a court of quarter sessions, and when ordered to be paid by parties other than a ratepayer shall be paid as in the Act mentioned.

It will be seen that the powers given to justices in assessment sessions are extremely wide, and are not limited to a discretion to give costs to a successful party only. In pursuance of such powers costs have been given in the following cases. Where an assessment committee, without examining the appellant's books, or fully hearing him or his solicitor, raised an assessment, and on an appeal the assessment was confirmed, the committee were condemned in costs, as they ought to have heard the appellant (*a*).

And where the appellants failed on a question of principle, but the respondents consented to a reduction, less than that

(*a*) *Mills v. The Assessment Committee of St. Olave's Union* (1886), Ryde's Rating Appeals, 84.

claimed by the appellants, it was held that the respondents were entitled to costs (*b*), and costs of an appeal from special sessions have not been given to a successful appellant (*c*). And where the appellants had claimed a much larger reduction than was allowed, no order as to costs was made (*d*). And where the appellants obtained a much smaller reduction of their assessment than they had claimed, the sessions gave them two-thirds of their costs (*e*).

SECTION 5.

OF THE GROUNDS OF APPEAL AGAINST POOR RATES.

The consideration of the grounds of appeal against poor rates necessarily involves the consideration of the whole law under which poor rates are made—of the parties by whom they must be made; of the purposes for which they may be made; of the subject-matters in respect of which and the parties on whom the assessment of them must be imposed; of the proportions which should be observed in making them; and of the forms according to which they must be made, published and allowed.

Although the enforcement of contributions for the relief of the poor may be traced to very early times, the present system of rating is entirely governed by the 43 Eliz. c. 2, s. 1, which may therefore be regarded as the test to which all questions of rating must be referred. By that statute it is enacted, “that the churchwardens and overseers of the poor of every parish, or the greater part of them, shall, by and with the consent of two or more justices of the same county, whereof one to be of the quorum, dwelling in or near the same parish or division where the same parish doth lie, raise weekly or otherwise by taxation of every inhabitant, parson, vicar, and

43 Eliz. c. 2,
s. 1.

Power to levy
the poor rate.

(*b*) *L. & N. W. R. Co. v. Assessment Committee of Hackney Union* (1886), Ryde's Rating Appeals, 136; *L. & N. W. R. Co. v. City of London Union* (1892), Ryde's Rating Appeals, 229.

(*c*) *Mackay v. Assessment Committee of the Strand Union* (1886), Ryde's Rating Appeals, 163.

(*d*) *Royal Masonic Institution v. Wandsworth and Clapham Union* (1891), Ryde's Rating Appeals, 8.

(*e*) *Braby & Co., Ltd. v. Greenwich Union* (1891), Ryde's Rating Cases, p. 54.

other, and of every occupier of lands, houses, tithes impropriate, propriations of tithes, coal mines [or saleable underwoods] in the said parish, in such competent sum and sums of money as they shall think fit, a convenient stock of flax, hemp, wool, thread, iron, and other necessary ware and stuff, to set the poor on work : and also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them being poor and not able to work ; and also for the putting out of such children to be apprentices—to be gathered out of the same parish, according to the ability of the same parish, and to do and execute all other things, as well for disposing of the said stock as otherwise concerning the premises as to them shall seem convenient.”

Saleable
underwoods.

Land used as
a plantation
or wood.

Rights of
fowling,
shooting, &c.

Mines.

By 37 & 38 Vict. c. 54, s. 11, so much of the above Act as relates to the taxation of an occupier of saleable underwoods is repealed, as from the coming into operation of that Act. And by sect. 3, the Act of Elizabeth and amending Acts are to extend to—(1) Land used for a plantation or a wood, or for the growth of saleable underwood, and not subject to any rights of common ; (2) to rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land ; and (3) to mines of every kind not mentioned in the above Act.

By whom the
rate is to be
made.

(1.) The first question which arises is, By whom the rate is to be made?

The rate can only be made in rural parishes by the overseers or the major part of them, as by sect. 5 (2) of the Local Government Act, 1894, churchwardens of rural parishes have ceased to be overseers. As to the transfer to the councils of boroughs or urban districts of the power of appointing overseers and assistant overseers, see sect. 31 (1) of the Local Government Act, 1894. An assistant overseer appointed by justices' warrant under 59 Geo. 3, c. 12, s. 7, and 7 & 8 Vict. c. 101, s. 61, to perform all the duties of the overseer, might formerly have been reckoned as one to make up the majority (*m*). Upon them the duty is imperatively cast, and, if neglected, may be enforced by mandamus (*n*), peremptory in the first instance, for otherwise the poor might starve (*o*) ; and where one of two overseers refuses to concur in making a rate, the other may apply for a mandamus (*p*). By 43 Eliz. c. 2, this duty is confined to overseers of *parishes* ; but inasmuch as there were many parishes of too great extent to be

(*m*) *Baker v. Locke* (1864), 34 L. J. C. P. 49.

(*n*) *R. v. Barnstaple* (1728), 1 Barnard. 137.

(*o*) *R. v. Edlston* (1836), 1 N. & P. 20.

(*p*) *R. v. Gadsby* (1837), 1 N. & P. 572.

governed by one set of overseers, 13 & 14 Car. 2, c. 12, s. 21, provided that in such cases the poor of every township or village of such parishes shall be maintained within it, and that for such place two or more overseers shall be annually appointed.

By 20 Vict. c. 19, s. 1, every place entered separately in the report of the registrar-general on the last census, which now is, or is reputed to be, extra-parochial, and wherein no rate is levied for the relief of the poor, the county police or borough rate, may be deemed a parish for such purposes, and be designated by the name which is assigned to it in such report.

As to extra-parochial places.

By sect. 4, if the owner and occupiers respectively of the land comprised in any extra-parochial place owning and occupying two-thirds in value at least of such lands shall express their desire in writing, signed by such major part, that such place be comprised in or annexed to any parish for the purposes aforesaid, and such parish shall consent thereto, such consent to be expressed by a resolution of the vestry after due notice, the justices of the peace in quarter sessions assembled, or the recorder of the borough, if such place be situated within a borough subject to the jurisdiction of a recorder, may make an order for the annexation of such place to such parish, and thenceforth the same shall be deemed to be part of the said parish for all such purposes.

By 31 & 32 Vict. c. 122, s. 27, every extra-parochial place shall from the 25th December, 1868, for all civil parochial purposes be annexed to and incorporated with the next adjoining parish with which it has the longest common boundary; and in case there shall be two or more parishes with which it shall have boundaries of equal extent, then with that parish which on the 31st July, 1868, contained the lowest amount of rateable value.

This statute was meant to supplement the 20 Vict. c. 19.

And as to accretions from the sea, banks of rivers, &c., see the same section.

Accretions from the sea, &c. to be incorporated in parishes.

An estuary or arm of the sea is *primâ facie* extra-parochial; but this presumption may be rebutted (*q*). And in the case of a navigable tidal river, the reclamation from the ooze or bed of the river and payment of poor rates upon such land is final as evidence of the parochiality of the reclaimed lands (*r*).

The mode of obtaining the benefit of that Act, in cases where it had not been brought into operation, was by procuring the appointment of overseers by magistrates of the division in

(*q*) *Ipswich Dock Commissioners v. The Overseers, &c.* (1866), 7 B. & S. 310.

(*r*) *Ibid.*

which the township lay; which, if granted, might be questioned either by appeal to the sessions (*s*), or by the removal of the appointment into the King's Bench Division by *certiorari*, on which the court would enter into the merits as disclosed by affidavit (*t*); and, if refused, might be enforced by mandamus, on the rule for, or on the return to which, the propriety of the charge might be fully discussed and solemnly decided. This demand could, however, be made only in respect of a township or vill (*u*). Appointment of more than four overseers under 43 Eliz. c. 2, was bad (*x*).

2. Of the Subjects of Rating.

Land and houses are the chief subjects of rating, and with respect to them we will consider,

1. What is rateable under the denomination "*land*"?
2. How must lands and houses be *occupied* to render them rateable?
3. On what principle, and in what matter, are lands and houses to be rated in respect of adjuncts or circumstances which increase their value to their possessor?

What is rateable under the denomination "*land*."

Everything is rateable under the denomination of *land*, which implies a possessory interest in the soil itself, but not mere easements or incorporeal hereditaments which are incapable of occupancy, unless they are connected with the enjoyment of land, and form part of its value. Thus, not only houses, but sheds, shops, barns, and all descriptions of buildings, are clearly rateable.

Electric telegraphs.

The posts, fastenings and wires of an electric telegraph company, erected under an agreement with a railway company, by which the former company erected and worked the posts,

(*s*) *R. v. Morris* (1792), 4 T. R. 550; *R. v. Spurrell* (1865), L. R. 1 Q. B. 72.

(*t*) *R. v. Great Marlow* (1802), 2 East, 244; *R. v. Cousins* (1864), 33 L. J. M. C. 87.

(*u*) *R. v. Standard Hill* (1815), 4 M. & S. 378.

(*x*) *R. v. Loxdale* (1758), 1 Burr. 445.

The appointment of overseers in rural parishes having a parish council is now given to the council, and in parishes having no council to the parish meeting (Local Government Act, 1894, ss. 5 (1) and 19 (5)), and by sect. 33 (1) of the same Act the Local Government Board may confer on municipal boroughs and urban districts the appointment of overseers. It is submitted that in future on failure to appoint overseers the procedure is by way of mandamus to the parish council or other authority in default.

wires and apparatus on the railway company's lines and stations, subject to removal to another situation on notice by the railway company, were held rateable as land in the exclusive occupation of the electric telegraph company (*y*). Telephone poles and wires fixed to the chimney or roof of a building amount to an occupation of land by the wires of the telephone company, and they are rateable (*z*), but not so where a telegraph company were users only and not occupiers of two wires under special arrangement with the postmaster-general (*a*). The case of a telegraph was held analogous to the case in which the Corporation of Bath were held liable to be rated in respect not only of the water-pipes by which they were empowered to bring water into the city from certain springs outside, but also in respect of reservoirs constructed by them outside, the court holding that there was no distinction between electric fluid conveyed through a parish and water, and that the company had a profitable occupation and not a mere easement (*b*); and road tramways are held rateable upon the same principle (*c*).

Telephone wires and poles.

Water-pipes and water-works.

A canal is nothing but a road covered with water and is rateable as land, and may include a dry dock lined with masonry, as well as stone bridges (*d*), and also land bought for cuts as well as for weirs, dams and locks (*e*), and for towing-paths (*f*); but a company formed and authorized to make a river navigable, and for that purpose clear, cleanse and scour the river or deepen the channel, do not acquire an occupation of the bed of the river or the soil of the channel, but have merely an easement over it or a right of making a passage, and the company is not rateable in respect of that bed or channel (*g*).

Canals.

Navigation.

(*y*) *The Electric Telegraph Co. v. Overseers of Salford* (1855), 24 L. J. M. C. 146.

(*z*) *Lancashire Telephone Co. v. Manchester* (1884), 14 Q. B. D. 267.

(*a*) *Paris and New York Telegraph Co. v. Penzance Union* (1884), 12 Q. B. D. 552.

(*b*) *R. v. Corporation of Bath* (1811), 14 East, 609; *R. v. West Middlesex Waterworks* (1859), 1 E. & E. 716.

(*c*) *Pimlico, &c. Tramways Co. v. Assessment Committee of Greenwich Union* (1873), 43 L. J. M. C. 29.

(*d*) *R. v. Neath Canal Navigation Co.* (1871), L. R. 6 Q. B. 707.

(*e*) *R. v. Mersey and Irwell Navigation Co.* (1829), 9 B. & C. 95; *R. v. Lower Milton* (1829), 9 B. & C. 810.

(*f*) *Ibid.*; *Bruce v. Willis* (1840), 11 A. & E. 463.

(*g*) *R. v. Mersey and Irwell Navigation Co., sup.*; *R. v. Thomas* (1829), 9 B. & C. 114; *R. v. Aire and Calder Navigation Co.* (1829), 9 B. & C. 820; *New Shorcham Commissioners v. Laving Churchwardens* (1870), 39 L. J. M. C. 121.

The case of *R. v. The Mersey and Irwell Navigation Company* (*h*) was distinguished in *The Electric Telegraph Company v. Salford* (*i*), and it was said, that in the former case persons were authorised to make a certain river navigable, and in consideration thereof to take tolls, and were held not to be rateable; but then the river was one navigable by all the subjects of the realm, and was not rendered the less navigable because a company which had got possession of it for certain purposes had a right to take a toll upon it. The company then had no right to exclude other persons from the river altogether, and consequently had no exclusive occupation.

Gas works,
what includes.

Gas companies are occupiers of the land in which their gas pipes are laid (*k*). The test of rateability is whether there is an occupation, and the facts of each particular case must determine who are (*l*) or who are not (*m*) occupiers. Gas retorts are so permanently attached and annexed to the freehold as to become part of it, and are not to be deemed movable fixtures, and are therefore rateable as part of the freehold (*n*). And the purifiers, steam engines, and gas holders are part of the works which are absolutely necessary for the manufacture of gas, and which are intended to remain permanently connected with the premises (*o*); and in determining what things are part of the premises or not, regard must be had to the degree of annexation and also to the object of the annexation—that is to say, whether the article was attached for the improvement of the inheritance or for the enjoyment only of the article itself. Thus articles may be attached to premises so as to be part of the premises for rateable purposes, though as between landlord and tenant and the heirs and executors there may be a right to remove them, as where the things are attached to the premises for the purpose of improving it, though still capable of removal.

Meters not.

Thus the meters placed in private houses are not rateable as being still chattels (*p*).

Tolls.

Tolls, or dues in gross, unconnected with the enjoyment of the land by the person rated, are not rateable *per se* under

(*h*) *R. v. Mersey and Irwell Navigation Co.* (1829), 9 B. & C. 95.

(*i*) (1855), 24 L. J. M. C. 146.

(*k*) *R. v. Brighton Gas Co.* (1826), 5 B. & C. 466.

(*l*) *Halkyn District Mines Drainage Co. v. Holywell Union*, [1895] A. C. 117.

(*m*) *Mayor, &c. of Southport v. Ormskirk Union*, [1894] 1 Q. B. 196.

(*n*) *R. v. Lee (Inh.)* (1866), L. R. 1 Q. B. 241.

(*o*) *Ibid.*

(*p*) *Ibid.*

43 Eliz. c. 2, s. 1 (*q*), but if any tolls or dues can be so incorporated or connected with the use of the land as to be taken to increase the value of the occupation, they may be taken into account in making the rate (*r*). Whether this be the case or no is a matter of evidence with respect to the origin and nature of the tolls or dues (*s*).

But a toll traverse taken by the lessee of the tolls, who was not the occupier of any part of the land in respect of which the toll arose, is not rateable (*t*); though the owner of land in respect of which the toll traverse is taken, who lets the tolls at a rent, is rateable (*u*). Toll traverse.

Market tolls for animals brought into the market for purposes of sale are not rateable, inasmuch as they are not paid in respect of the use of the soil, but for the market. They are distinguishable from stallage. The ground on which the distinction appears to rest is, that the animals brought into the market for sale merely occupy no particular spot in the market, and are not stationary, and there is therefore no occupation of land to which the tolls can be referred (*x*); but doubt is thrown on these decisions by a more recent case (*y*), in which it has been held that tolls paid for goods brought into an enclosed market where no particular spot was occupied are rateable; but lessees of stallage are rateable, because that is a payment made to the owner of the soil in respect of the use of the soil and the liberty to erect stalls on the soil (*z*). But not a stall-holder who only has the right to a stall in a given row, and not the right to place one on any definite portion of ground (*a*). Market tolls.

(*q*) *R. v. Nicholson* (1810), 12 East, 330; *Williams v. Jones* (1810), 12 East, 346.

(*r*) *R. v. Macdonald* (1810), 12 East, 324.

(*s*) See *Lewis v. The Overseers of Swansea* (1855), 5 E. & B. 508, where town dues and quayage were held not to be rateable; and *R. v. Earl of Durham* (1859), 28 L. J. M. C. 232, where anchorage and beaconage dues were held not to be tolls in gross, but tolls connected with the occupation and use of the soil as dock dues, and were rateable upon a calculation of the number of ships paying the toll and coming into those parts of the port which were in the parish.

(*t*) *R. v. Snowdon* (1833), 4 B. & Ad. 713.

(*u*) *R. v. Marquis of Salisbury* (1838), 8 A. & E. 716.

(*x*) *R. v. Caswell* (1872), L. R. 7 Q. B. 328; *S. C.*, *Caswell v. The Overseers of the Borough of Wolverhampton*, 41 L. J. M. C. 108; *Mayor of London v. St. Sepulchre* (1871), L. R. 7 Q. B. 333, n.

(*y*) *Duke of Bedford v. St. Paul's, Covent Garden* (1881), 51 L. J. M. C. 41.

(*z*) *Roberts v. Aylesbury* (1853), 22 L. J. M. C. 34; see *R. v. Bell* (1816), 5 M. & S. 221.

(*a*) *Spear v. Bodmin Union* (1880), 49 L. J. M. C. 69.

Tolls of ferry.

Ferry tolls cannot be rated as tolls unless they can be treated as appurtenant to the landing-place (*b*); nor could the tolls be indirectly rated by laying the rate upon the landing-place. On the other hand, the existence of the tolls cannot be wholly excluded from consideration; but the land should be rated, and the value should be taken, not as the value of land merely, but as the value of land as enhanced by being available for the purpose of earning the tolls, as it would be the rent which could be obtained, and which the company would have to pay for the land for the purpose for which it is available under the circumstances (*b*).

Rights of way.

Running powers do not confer occupation.

A right of way without exclusive occupation is an easement only, and is not rateable (*c*); and therefore the possession of running powers by one company over the line of another company confers an easement which is not rateable, and does not make the company exercising the powers joint occupiers with the company subject to the power, so as to make both companies rateable (*d*).

As to the rateable value of the company subject to the power, see *post*.

Railway companies using joint station.

But if there be an exclusive possession and occupation of the line of a road the occupier will be rateable (*e*). While if there be a right of user only, the owning company retaining the general possession or management of the whole, the owning company is rateable (*f*). And the same rule applies with regard to joint user of a railway station; for where an agreement was made between the London and North Western and the Eastern Counties Railway with respect to the use of the Peterborough station belonging to the Eastern Counties Railway, and the effect of the agreement was held to be simply to give the right to the use of the station to the North Western Company, without taking the occupation out of the Eastern Counties Company, it was held that the Eastern Counties Company were rightly rated as sole occupiers: but this depended upon the terms of the instrument (*g*).

(*b*) *R. v. North and South Shields Ferry Co.* (1852), 1 E. & B. 140.

(*c*) *R. v. Jolliffe* (1787), 2 T. R. 90; see *Pimlico, &c. Tramways Co. v. Greenwich Union Assessment Committee* (1873), 43 L. J. M. C. 31, *per* Blackburn, J.

(*d*) *The Midland Rail. Co. v. Badgworth* (1864), 34 L. J. M. C. 25.

(*e*) *North and South Western Junction Rail. Co. v. Brentford Union* (1887), 18 Q. B. D. 740, not overruled on this point on appeal; *R. v. Bell* (1816), 7 T. R. 90; see *Pimlico, &c. Tramways v. Greenwich Union Assessment Committee, sup.*

(*f*) *R. v. Lord Sherard* (1863), 33 L. J. M. C. 5; *Midland Rail. Co. v. Badgworth, sup.*

(*g*) *R. v. Lord Sherard, sup.*; see *Allan v. Overseers of Liverpool* (1874), L. R. 9 Q. B. 180; *Inman v. Overseers of Kirkdale, ibid.*

The only mines mentioned by the statute of Elizabeth are Mines. coal mines, and therefore before the 37 & 38 Vict. c. 54 (the Rating Act, 1874), other mines were not rateable; but now the Act of Elizabeth is by that statute (sect. 3, sub-s. 3) extended to mines of every kind, except those of which the royalty or dues are for the time being wholly reserved in kind, or to the owner or occupier thereof (*h*).

Since all mines have been made rateable the distinction Mines. between a mine and a quarry has ceased to be of such importance (*i*). Quarries.

To render any property liable to the rate, it must be occupied for the benefit or under the control of some individual or body of persons. The owner of a vacant house as long as he leaves it vacant is not rateable. If, however, he furnishes it and keeps it ready for occupation whenever he pleases to go to it, he is an occupier though he may not reside in it one day in the year (*m*), and if he occasionally use any part he will be liable to be rated for the whole (*n*); but where a house, not structurally severed, was let partly to one tenant and partly to another, and each had the exclusive use of the part let to him, it was held that each was the occupier of a separate tenement capable of being rated (*nn*), and perhaps now the decision in *R. v. St. Mary-the-Less* might not be followed. The owners of certain warehouses gave notice to the overseers that they intended to keep such warehouses empty and unoccupied during the year for which rates were about to be made, and that they would claim exemption from such rates. All goods had been removed from the warehouses, although some permanent shafting remained, and the warehouses were, in fact, unused and unoccupied. It was held by a Divisional Court that the justices were justified in coming to the conclusion that there was no occupation of the warehouses so as to render the respondents liable to be rated in respect thereof (*o*).

If premises are practically unlettable they are not rateable; Empty premises. but if the owner does not choose to let them, but holds out for a higher rent, that will not prevent his being liable to be rated at what may be found to be the fair rent (*p*); and

(*h*) 37 & 38 Vict. c. 54, s. 13.

(*i*) For the old authorities on this point, see *R. v. Dunsford* (1835), 2 A. & E. 568; *R. v. Brettell* (1832), 3 B. & Ad. 424; *R. v. Sedgley* (1831), 2 B. & Ad. 65.

(*m*) *R. v. St. Pancras* (1877), 2 Q. B. D. 581, *per* Lush, J., at p. 588.

(*n*) *R. v. St. Mary-the-Less* (1791), 4 T. R. 477.

(*nn*) *Alleghureh v. Hendon Union*, [1891] 2 Q. B. 436.

(*o*) *Overseers of Bootle v. Liverpool Warehousing Co.* (1901), 85 L. T. 45.

(*p*) *Per* Crompton, J., in *Harter v. Overseers of Salford* (1865), 34 L. J. M. C. 206.

Blackburn, J., in the same case says : “ When premises are to be let they are in practice considered as empty, and are not rateable. That may be a good rule of thumb, which works well in practice ; but when the landlord retains possession, and actually has some beneficial occupation, he is rateable at least to the extent of that benefit.” In that case the owner of a mill had ceased to work the mill, and kept possession of it until he could find a purchaser. The mill contained a quantity of machinery, and other things necessary for the manufacture of silk, and it was held, that though the premises were not rateable as a mill in working order, yet they were rateable at a value estimated on the footing of their being used as a warehouse for the machinery (*q*).

New and
unoccupied
houses.

Under the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), s. 14, the overseers of each parish had to make a list of all the rateable hereditaments in such parishes ; and houses newly erected on land within the parish, finished and ready for occupation, are deemed rateable property within the meaning of sects. 14 and 25 of the Act, and must be inserted in the valuation list, though none of them have ever been let or occupied (*r*). Lush, J., says : “ ‘Rateable’ means property in its nature liable to be rated, and whether it is occupied or not can make no difference. The word ‘rateable’ relates to the quality of the property, and not to the occupation.” It seems that unoccupied houses had been held rateable to the county rate under 15 & 16 Vict. c. 81, ss. 2 and 6, as being rateable to the poor (*s*).

New houses.

A new house or building incomplete, or not fit for occupation, or not entered in valuation list at the time when the current rate was made, may be entered by the overseers in the rate-book, and the occupier required to pay a proper amount of the rate according to the circumstances (*t*).

Exclusive
occupation of
land, what.

Land in the occupation of a tenant from year to year, with a right reserved to the landlord to get minerals, and by the landlord let out to contractors to work coprolites out of the land, under an agreement by which they were to enter upon the land and dig for and wash the coprolites, and then to replace the earth and level it and restore it to its proper state, is rateable during the currency of the agreement, as in the exclusive occupation of the contractors under a demise, and not as being in the occupation of the tenant of the land or the

(*q*) *Harter v. Overseers of Salford* (1865), 34 L. J. M. C. 206. See also *Staley v. Overseers of Castleton* (1864), 33 L. J. M. C. 179 ; and *Staunton v. Powell* (1867), 1 Ir. C. L. 182.

(*r*) *R. v. Malden* (1869), 38 L. J. M. C. 125 ; L. R. 4 Q. B. 326.

(*s*) *R. v. Hammersmith* (1859), 33 L. T. 183.

(*t*) 31 & 32 Vict. c. 122, s. 38.

landlord (*u*); and this case is distinguishable from the case of a person who takes furnished lodgings, under an agreement by which he is to have the exclusive enjoyment of his rooms, but the occupation remains in the landlord of the house, who has to furnish the servants who are to look after the lodgings, light the fires, and clean the rooms, which requires their coming into and remaining in his rooms for such purposes (*x*). Lodgers are not rateable, while the tenant of a flat is so in most cases (*y*). A person taking under an agreement a right to the growing grass of a field, which would require the exclusive occupation to enjoy the right, would also probably take such an interest in the land as to make him the rateable occupier (*z*).

If a person appears to be in the visible occupation of land, he would be rateable as occupier *de facto*, and it is not necessary to inquire into the title of the occupier. "If a disseisor obtain possession of land he is rateable as occupier of it" (*a*).

So, a *de facto* occupation of their mains by a gas company is sufficient without any legal or equitable estate in the land under an Act of Parliament (*b*).

The trustees of a school under a settlement, occupied not for a public purpose but for a private charity, and subject to a scheme and order of chancery for carrying out those trusts, are rateable as occupiers in respect of the trust premises (*c*).

The promoters of an undertaking within the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), who become possessed of lands liable to be assessed to the poor rate, are, until the works shall be completed, liable under the 133rd section to make good the deficiency in the assessment to the poor's rate by reason of such lands having been taken for the purposes of the works; but this section does not render them liable to be rated (*d*); and if such an undertaking, say a railway, consists of several parts, extending into various parishes, and a portion in one parish is completed and in work, but the other portions are not completed, the company is liable to be assessed to the poor rate as a railway in the parish where it

Occupiers.

Occupation
by trustees
of charity.By promoters
of an under-
taking within
Lands Clauses
Act.

(*u*) *Roads v. Overseers of Trumpington* (1870), L. R. 6 Q. B. 56.

(*x*) *Per* Blackburn, J., in *Roads v. Overseers of Trumpington*, *ubi sup.*

(*y*) *Bradley v. Baylis* (1881), 8 Q. B. D. 195; *R. v. St. George's Union* (1871), L. R. 7 Q. B. 90.

(*z*) See *Roads v. Overseers of Trumpington*, *ubi sup.*; *Crosby v. Wadsworth* (1805), 6 East, 602.

(*a*) *Per* Lord Kenyon, C. J., *R. v. Bell* (1798), 7 T. R. 601.

(*b*) *R. v. West Middlesex Waterworks* (1859), 28 L. J. M. C. 135, *per cur.*

(*c*) *R. v. Stapleton (Inh.)* (1863), 33 L. J. M. C. 17.

(*d*) *Mayor, &c. of London v. Churchwardens, &c. of St. Andrew's, Colborn* (1867), L. R. 2 C. P. 574.

is completed and as to the uncompleted part must make good the deficiency in the rates (*e*).

Who are
promoters.

The Metropolitan Board of Works were promoters of an undertaking within the 133rd section of the Lands Clauses Act, when that Act was incorporated with an Act under which they took lands for the purposes of making a new street, and were, therefore, liable to make good the deficiency in the rates caused by their rating land assessable to the poor rate for the purpose of the street, until the street was made (*f*). It has been held that sect. 133 is incorporated in the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70) (*g*).

When occupa-
tion does not
amount to
exclusive
demise.

There must be such an exclusive occupation of land as to give an action of trespass in case of wrongful interference with it. Thus, where an agreement between the Royal Commissioners for the Exhibition of 1862 and M., the effect of which was only to grant the right of selling refreshments, and not to give M. the exclusive occupation of the western section of the refreshment department, so as to have entitled him to turn off the commissioners and their friends if they had chosen to walk through the portion of the building set apart for that department, it was held that there was no such occupation as would make M. rateable (*h*).

And so again, where the Oxford University boat club were rated in respect of the university barge, moored on the river at Oxford, it was held, that the proof of exclusive occupation of the land on which the posts were fixed to which the barge was attached and over which it floated, failed on the ground that there was nothing to show that the posts to which the barge was attached, and which were rated, were not in the occupation of the corporation of Oxford as owners of the soil. Nor did it appear that the persons rated had fixed the posts in the bed of the river, nor was there anything to show that if any other persons navigating the river treated these posts as mere mooring places, and interfered with what was assumed to be the occupation of the club, there would be any remedy by action of trespass against them, and as such exclusive occupation was necessary, the rate was bad (*i*).

Occupier is
liable not-
withstanding

In the *Electric Telegraph Company v. Salford* (*k*), *Williams v. Jones* (*l*) was relied on, where the owner of a ferry was

(*e*) *East London Rail. Co. v. Whitechurch* (1874), L. R. 7 H. L. 81, overruling *R. v. Metropolitan District Rail. Co.* (1871), L. R. 6 Q. B. 698.

(*f*) *Wheeler v. Metropolitan Board of Works* (1869), L. R. 4 Ex. 303; and see *Governor of Poor of Bristol v. Mayor of Bristol* (1887), 18 Q. B. D. 549.

(*g*) *St. Leonard's, Shoreditch v. London County Council*, [1895] 2 Q. B. 104.

(*h*) *R. v. Morrish* (1863), 32 L. J. M. C. 245.

(*i*) *Grant v. Oxford Local Board* (1868), L. R. 4 Q. B. 9.

(*k*) (1855), 24 L. J. M. C. 146.

(*l*) (1810), 12 East, 346.

held not liable to be rated in respect of a post by which his ferry boats were secured, but there all the subjects of the crown had a right to use the post; but the exclusive occupation of a mere easement does not make the person enjoying the easement liable to the rate, but the occupier only is rateable, though he may have granted an exclusive easement to another person, if such grant does not amount to a demise. This was decided with reference to the moorings of a hulk which had been attached to the same moorings for five years, and the moorings were permanently fixed in the bed and soil of the river by and were the property of the conservators of the Thames, who by an agreement granted liberty and licence to W. W. to keep his hulk fastened to the moorings until either party should give a month's notice to end the licence, the court holding that the agreement did not amount to a demise of the moorings to W. W., but only a licence, though exclusive, to use the moorings, whilst the occupation remained in the conservators of the Thames. It seemed to have been assumed in that case that the moorings occupied the soil, and that the conservators were the occupiers, and it was suggested that the measure of the value of the occupancy would in ordinary cases be the money they gained by allowing the appellant to moor his hulk to those moorings^(m).

he has granted an exclusive easement to another.

Moorings for a hulk in the Thames.

The soil of a river may be occupied by means of a floating pier, where the floating pier has acquired a permanent and fixed locality⁽ⁿ⁾. Lord Campbell, C. J., in his judgment says: "This case, therefore, comes much nearer *The Queen v. Leith*^(o) than to *The Queen v. Morrison*^(p), on which the appellants mainly relied. In the case now before us, there is a permanent and profitable occupation of the soil within the parish of the respondents, who are, therefore, entitled to our judgment"⁽ⁿ⁾. But where the owners of a coal derrick were rated, which rode afloat on the river Thames, held by ordinary anchors, merely dropped in the river, and the derrick was always afloat and liable to be moved to any other part of the river, at the pleasure of the conservators: it was held not rateable, as having no occupation of the soil, but was only as a loiterer on the way^(q). The same derrick was the subject of litigation five years later, and under circumstances which differ both from *Cory v. Greenwich Overseers*^(q) and from *Watkins v. Milton-next-Gravesend*^(m). Permanent moorings had been sunk and fixed in the bed of the river by, and were the property of, the owners of the derrick, and it was impossible for the derrick to lift or move such moorings; and on these

Floating pier permanently moored.

Not permanently moored.

^(m) *Watkins v. Milton-next-Gravesend* (1868), L. R. 3 Q. B. 350.

⁽ⁿ⁾ *R. v. Forrest and another* (1858), 27 L. J. M. C. 96.

^(o) *R. v. Leith* (1852), 21 L. J. M. C. 119.

^(p) *R. v. Morrison* (1852), 22 L. J. M. C. 14.

^(q) *Cory v. Overseers of Greenwich* (1872), L. R. 7 C. P. 499.

facts it was held by the House of Lords that the derrick owners were liable to be rated, as they must be treated as persons in occupation of a part of the soil and bed of the river (*r*).

Floating
dock.

A floating dock which was moved across the river, and was sometimes in one parish and sometimes in another, is not rateable *per se* under the stat. 43 Eliz. c. 2, inasmuch as it cannot be said to give any such occupation of land as would be capable of being rated: it resembles a ship at anchor, which occasionally grounds when the tide ebbs, and which may be approached by a boat (*s*). Nor can a floating dock be included in the rateable value of a ship-building yard in the occupation of the proprietor of the dock, and used in connection with it, and the decisions respecting machinery and other fixtures have no application in such a case (*t*). And now the decision in *R. v. Morrison* must be read in conjunction with a more recent case (*u*), where a creek was excavated on land the property of a pontoon building company, and two pontoons were moored in the creek: they were occupied with the company's yard and were permanently attached to it, and it was held that the occupation of the land was enhanced by reason of their being attached and used in connection therewith.

The National Rifle Association were held not to be rateable as occupiers of the rifle-shooting ground and place of encampment on Wimbledon Common for the annual rifle meeting; but this decision was influenced by the terms of the special Act of Parliament under which the association occupied the ground (*x*).

As to rights
of fowling,
shooting,
killing game
or rabbits,
and fishing.

Rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land, are now rateable (*y*).

By sect. 6 of the Rating Act, 1874, it is enacted that—
(1.) Where any right of fowling, or of shooting, or of taking or killing game or rabbits, or of fishing (hereinafter referred to as a right of sporting), is severed from the occupation of the land, and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross or rateable value of the land shall be estimated as if the said right were not severed: and in such case, if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted to pay such rate in the

(*r*) *Cory v. Bristow* (1877), 2 App. Cas. 262.

(*s*) *R. v. Morrison* (1852), 22 L. J. M. C. 14.

(*t*) *Ibid.*

(*u*) *Tyne Pontoons Co. v. Tynemouth Union* (1897), 76 L. T. 782.

(*x*) *Mildmay v. Overseers, &c. of Wimbledon* (1872), 41 L. J. M. C. 133.

(*y*) The Rating Act, 1874 (37 & 38 Vict. c. 51), s. 3.

event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of such increase; and every assessment committee, on the application of the occupier, shall certify, in the valuation list or otherwise, the fact and amount of such increase.

(2.) Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof. Who rateable for right of sporting.

(3.) Subject to the foregoing provisions of this section, the owner of any right of sporting when severed from the occupation of the land may be rated as the occupier thereof.

(4.) For the purposes of this section the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right.

Where the owner of land lets the right of sporting over part of the land which he retains in his own occupation, the lessee may be rated in respect of the right of sporting under sect. 6, sub-sect. 2, quoted above (z); and in rating woodlands under sect. 4 of the Rating Act, 1874, the right of sporting is properly taken into account in estimating the rateable value of the land in its natural and unimproved state (a).

A mere right of common, although carrying with it the right to exclude the owner of the soil during a certain period of the year, is not rateable (b). Rights of common.

The crown not being named in the statute of Elizabeth is not bound by it, and consequently the overseers cannot impose a rate on the sovereign in respect of lands occupied by his Majesty, nor on those occupied by servants for his Majesty. The exemption depends entirely on the occupier and not on the title to the property. Who not rateable occupiers. Crown or crown servants occupiers not rateable.

The position as regards crown property is laid down in a judgment (c) of Blackburn, J., as follows:—"The tenants of crown property, paying rent for it, are rateable like all other occupiers; and it has even been determined that where apartments in Hampton Court, a royal palace, were gratuitously assigned to a subject who occupied them by permission of the sovereign, but for the subject's benefit, the subject was rateable in respect of her occupation of this royal property" (d). Crown tenants rateable.

On the other hand, where a lease of private property is taken in the name of a subject, but the occupation is by the

(z) *Kenrick v. Overseers of Guilsfield* (1879), 5 C. P. D. 41.

(a) *Eyton v. Overseers of Mold* (1880), 6 Q. B. D. 13.

(b) *R. v. Churchill* (1825), 4 B. & C. 750.

(c) *Jones v. Mersey Docks* (1865), 11 H. L. Cas. 443, at p. 463; and see the judgment of Lord Esher, M. R., in *Tunnicliffe v. Overseers of Birkdale* (1888), 20 Q. B. D. 450, at pp. 451, 452.

(d) *R. v. Lady Emily Ponsonby* (1842), 3 Q. B. 14.

sovereign or his servants in his behalf, the occupation being that of his Majesty, no rate can be imposed (*e*).

The Royal Academy.

The Museum of Geology.

The Kneller Hall.

The members of the Royal Academy who then occupied part of the National Gallery have been held to be exempt, as occupying crown property, and as being agents of the crown (*f*). And so, also, the Museum of Practical Geology, being built with public money on the hereditary property of the crown and no one but a housekeeper living on the premises, was held not rateable (*g*); whilst Kneller Hall, where a normal and model school was purchased by the Treasury on behalf of the council of the education board, for the training of masters of schools for pauper and criminal children, was held to be rateable (*h*); but it is suggested that this decision must be considered in the light of more recent cases; in *R. v. Temple* the principal of the school was treated as occupier, whereas the real occupiers should have been the committee of the Council of Education, in which case it seems that the facts would be similar to those in *R. v. McCann* (*i*), where the Commissioners of Works constructed a bridge with money borrowed from the Treasury and took tolls, and were rated as occupiers, and it was held that the commissioners were not liable to be rated as they were servants of the crown.

Property occupied for the purposes of the government of the country.

Lord Blackburn, in a later part of his judgment in the *Mersey Docks case*, quoted before, says:—"The exemption of the crown, by reason of its not being named in the statute of Elizabeth, has been carried a good deal further, and applied to many cases in which it can scarcely be said that the sovereign or the servants of the sovereign are in occupation. A long series of cases have established that where property is occupied for the purposes of the government of the country, including under that head the police and the administration of justice, no one is rateable in respect of such occupation. And this applies not only to property occupied for such purposes by the servants of the great departments of state, such as the post office (*k*), the horse guards (*l*), or the admiralty (*m*), in all which cases the occupiers might strictly be called the servants of the crown, but also to property occupied by local police (*n*), to county buildings occupied by the assizes, and for

(*e*) *Lord Amherst v. Lord Somers* (1788), 2 T. R. 372.

(*f*) *R. v. Shee* (1843), 12 L. J. M. C. 53.

(*g*) *De la Beche v. St. James, Westminster* (1855), 24 L. J. M. C. 74.

(*h*) *R. v. Temple* (1853), 22 L. J. M. C. 120.

(*i*) *R. v. McCann* (1868), L. R. 3 Q. B. 141.

(*k*) *Smith v. Birmingham* (1857), 26 L. J. M. C. 105.

(*l*) *Lord Amherst v. Lord Somers, ubi sup.*

(*m*) *R. v. Stewart* (1857), 27 L. J. M. C. 81.

(*n*) *The Justices of Lancashire v. Stretford* (1858), E. B. & E. 225; *sub nom. R. v. Justices of Lancashire*, 27 L. J. M. C. 209.

the judges' lodgings (*o*); or occupied as a county court (*p*); or for a gaol (*q*). In these latter cases it is difficult to maintain that the occupants are, strictly speaking, servants of the sovereign, so as to make the occupation that of his Majesty; but the purposes are all public purposes of that kind which, by the constitution of this country, fall within the province of government and are committed to the sovereign, so that the occupiers, though not perhaps strictly servants of the sovereign, might be considered *in consimili casu*" (*r*).

Bethlehem Hospital, for the reception and cure of poor lunatics, in the hands of the mayor and corporation of London as trustees; and, again, Bridewell Hospital, for harbouring and correcting vagabonds, where they were maintained at the charge of the hospital and taught useful trades, raw materials being bought and worked up by the inmates, such as were not consumed in the hospital being sold, and the proceeds forming part of a general fund for the purchase of other materials to be manufactured and no profit being made by the sale, were held to be occupied for public purposes only, and not rateable in the hands of the trustees as occupiers (*s*); but since the decision in *Jones v. The Mersey Docks Co.* (*r*) this is no longer good law, and hospitals are now rated to the poor rate (*ss*). Hospitals.

A prison is not rateable, and houses situated outside the prison walls, but adjoining to the gate of the gaol, and occupied by warders of a gaol for the purpose of their duties inside the gaol, are free from rates (*t*); so are assize courts (*u*) and buildings necessarily occupied for the purpose of administering justice (*x*). Since the passing of the Local Government Act, 1888, many of the duties which were formerly performed by the justices of the county in quarter sessions as servants of the crown and for the purposes of county government, have been transferred to the county councils; and it has been held that premises used by the county council for the purposes of the administrative business of the county are not exempt from rating (*y*), and that where premises are jointly occupied by the quarter sessions of a county and by the county council for administrative purposes, the county council are rateable in respect of their occupation of the premises (*y*). Prisons. County buildings.

(*o*) *Hodgson v. The Local Board of Health of Carlisle* (1857), 8 E. & B. 116.

(*p*) *R. v. The Township of Manchester* (1854), 23 L. J. M. C. 48.

(*q*) *R. v. Shepherd* (1841), 1 Q. B. 170.

(*r*) *Jones v. Mersey Docks and Harbour Co.* (1865), per Blackburn, J., 11 H. L. Cas. 443.

(*s*) *R. v. St. George the Martyr, Southwark, Bethlehem Hospital and Bridewell Hospital* (1847), 16 L. J. M. C. 129.

(*ss*) *Ilkley Hospital Trustees v. Ilkley Churchwardens* (1865), 41 L. T. J. 42.

(*t*) *Justices of Beds. v. St. Paul, Bedford* (1852), 7 Exch. 650.

(*u*) *Coomber v. Justices of Berks* (1883), 9 App. Cas. 61, per Lord Watson, at p. 74.

(*x*) *R. v. St. Martin's, Leicester* (1867), L. R. 2 Q. B. 493, at p. 502.

(*y*) *Middlesex County Council v. St. George's Union*, [1897] 1 Q. B. 64.

and the exemption from rateability applies only where the property is used exclusively for the service of the crown (z).

Post office.

The postmaster-general is the occupier of premises used exclusively for the purposes of the post office, and occupies as an officer of the crown and is exempt from rates. The Telegraph Act, 1868, enacts (sect. 22) that all land purchased by the postmaster-general for the purposes of the Act shall be rateable at sums not exceeding the rateable value at which such land was properly assessed at the time of purchase; and it has been held that this section of the Act applies to property purchased under the Act, notwithstanding all use of the house for telegraph purposes had ceased and the property had been let (a).

Volunteers.

Premises occupied by, and used solely for the purposes of the service of, a volunteer corps are exempt, including not only storehouse for arms, ammunition, &c., but all such other parts of the premises as are reasonably necessary for the service of the corps (b).

Occupation for public purposes.

But the exemption in respect of occupation by crown servants for public purposes does not extend to premises occupied by a subject who, by an agreement with servants of the crown, e.g., the Commissioners of the Inland Revenue, not amounting to a demise, gave the Commissioners exclusive possession for such purposes of a portion only of the premises, in consideration of a money payment made to include not only the rent, but the expenses of gas, wood, coals, and of a person to reside on and keep clean the premises (c).

Reformatory school.

A reformatory school established under the repealed statutes, 17 & 18 Vict. c. 86; 18 & 19 Vict. c. 87; and 20 & 21 Vict. c. 55 (repealed by the Reformatory Schools Act, 1866 (d)), was held not to be rateable; but this decision must now be considered as overruled, and later cases—decided after *Jones v. Mersey Docks*—hold that an industrial school, supported partly by charitable contributions and partly by government grant, and certificated under the Reformatory Schools Act, 1866, is not exempt (e).

County chief constable's house.

Upon the same principle, a rate assessed upon the chief constable of the county of Leicester in respect of premises occupied by him for the police purposes of the county, and upon an inspector of police of the same county in respect of other premises occupied by him for similar purposes, was quashed (f). In that case the premises were considered

(z) *Worcestershire County Council v. Worcester Union*, [1897] 1 Q. B. 480.

(a) *Overseers of St. Gabriel, Fenchurch v. Williams* (1885), 16 Q. B. D. 649.

(b) *Pearson v. Holborn Union*, [1893] 1 Q. B. 389.

(c) *Smith v. The Overseers of St. Michael, Cambridge* (1860), 30 L. J. M. C. 74.

(d) 29 & 30 Vict. c. 117.

(e) *R. v. West Derby* (1875), L. R. 10 Q. B. 283; *Tunncliffe v. Overseers of Birkdale* (1888), 20 Q. B. D. 450; *Durham County Council v. Chester-le-Street*, [1891] 1 Q. B. 330.

(f) *R. v. St. Martin's, Leicester* (1867), L. R. 2 Q. B. 493.

exempt from the rate on the ground that they were so completely brought within the control of the Home Office that they may fairly be said to be used for public purposes in the sense of government purposes; and Cockburn, C. J., guarded himself from expressing an opinion as to whether they would be rateable if they had been occupied merely for the purposes of the local police. But a block of buildings used as residences by the chief constable of a county, the deputy constable and two other officers of the constabulary, has been held rateable (*g*), and the fact that the officers are obliged to reside in the houses does not alter the case; and this has been followed in a more recent case, where premises were formerly used as a police station with two cells, but were then used as the residence of two constables and their families, one cell being retained, and it was held the premises were properly rated to the poor rate (*h*): but where from the circumstances of the case the houses of the police officers were held to form part of the police station, they are exempt (*i*).

But the county justices of Lancashire were held rateable in respect of the part of the assize courts, judges' lodgings, &c. at Manchester, which they let to the corporation of the city of Manchester for the purposes of the city quarter sessions and the city court of record for the sums of 600*l.* per annum, and 300*l.* per annum for incidental expenses, notwithstanding that all the sums received in respect of such use were applied by the justices towards the expenses of keeping up the courts, &c., and in aid of the special rate which they were empowered to make for the expense of the courts (*k*): but this case has been much doubted. Assize court.

Under the provisions of 4 & 5 Vict. c. 48, s. 1, municipal corporate property situate in a parish wholly in the bounds of the city was exempt from poor rate; but this section was repealed by 39 & 40 Vict. c. 61, s. 30, and municipal corporations are now rateable in respect of their property.

The University of Edinburgh is not exempt from rating on the ground that it was created by royal charter. It was held that it was neither held by the crown nor for the crown, and the fact that it was dedicated for public purposes was a wholly insufficient ground of exemption (*l*).

It was held that the Bodleian Library and the schools, and the Convocation House, the University Galleries, the Clarendon Buildings, the Botanic Gardens, the Taylor Institution, the Old Convocation House, and the Law Schools and the Sheldonian Theatre, were occupied by the university solely for Exemption of the universities, how far.

(*g*) *Showers v. Chelmsford Union*, [1891] 1 Q. B. 339.

(*h*) *Overseers of Monmouth v. Monmouthshire County Council* (1902), 87 L. T. 65.

(*i*) *Cross v. West Derby Union* (1900), 16 T. L. R. 120.

(*k*) *Justices of Lancashire v. Overseers of Cheetham* (1867), L. R. 3 Q. B. 14.

(*l*) *Greig v. University of Edinburgh* (1868), L. R. 1 Sc. App. 348.

public purposes and not rateable (*m*); but this decision was before the decision in the *Mersey Docks case* (*n*), and before the passing of 28 & 29 Vict. c. 108, s. 8, which expressly provides that all public buildings of the University and City of Oxford (except churches) shall be assessable to the general district rates.

It is clear that since the decision in the *Mersey Docks case* all property capable of beneficial occupation, and which if let to a tenant would be capable of producing rent, is liable to be rated, although in the hands of trustees who occupy it under Acts of Parliament for the maintenance of works declared to be beneficial to the public, though such trustees derive no benefit from the occupation, and though the revenues arising from such occupation are exclusively applied to the maintenance of the works. And in earlier cases the commissioners of the Huddersfield Waterworks were held rateable, though the occupation, restricted as it was by Act of Parliament, was of no benefit to themselves, and the inhabitants of the town were benefited, as consumers, by a cheap supply of water from the works (*o*); and the corporation of Liverpool, in whom waterworks were vested for the purpose of supplying water to the inhabitants particularly and the town generally, and who by their Act were restrained from making any profit out of the water supply, were in like manner held rateable (*p*). And the corporation of Manchester were held rateable in respect of waterworks of a company acquired and carried on by them under a local Act, by which they were empowered to levy water rates on the inhabitants of the borough, though all the sums received from water rates and from the works were absorbed by the annual payments required to be made by the Act to the water company, as the price of their works (*q*).

Sunday and ragged schools are exempted from rating by 32 & 33 Vict. c. 40, by sect. 1 of which it is enacted, "that every authority having power to impose or levy any rate upon the occupier of any building or part of a building used exclusively as a Sunday school or ragged school may exempt such building or part of a building from any rate for any purpose whatever which such authority has power to impose or levy: provided that nothing in this Act contained shall prejudice or affect the right of exemption from rating of Sunday or infant schools or for the charitable education of the poor in any churches, district churches, chapels, meeting-houses or other premises, or any vestry-rooms belonging

(*m*) *Case of the Oxford Poor Rate* (1857), 27 L. J. M. C. 33.

(*n*) *Jones v. The Mersey Docks and Harbour Co.* (1865), 11 H. of L. Cas. 443.

(*o*) *R. v. Overseers of Longwood* (1852), 21 L. J. M. C. 215.

(*p*) *Mayor of Liverpool v. Overseers of West Derby* (1856), 25 L. J. M. C. 112.

(*q*) *R. v. Mayor, &c. of Manchester* (1852), 21 L. J. M. C. 160.

The Hudders-
field Water-
works.

Liverpool
Waterworks.

Manchester
Waterworks.

Exemption of
Sunday and
ragged
schools.

thereto or any part thereof, by virtue of Poor Rate Exemption Act, 1833 (3 & 4 Will. 4, c. 30)."

By sect. 2 a "Sunday school" within the above enactment means any school used for giving religious education gratuitously to children and young persons on Sunday and on week days, for the holding of classes and meetings in furtherance of the same object, and without pecuniary profit being derived therefrom.

And by the same section a "ragged school" means any school used for the gratuitous education of children and young persons of the poorest classes, and for the holding of classes and meetings in furtherance of the same object, and without any pecuniary benefit being derived therefrom except to the teacher or teachers employed. The rating authority have a discretion whether they will or will not exempt such a building (*r*).

Voluntary schools are also now exempted from rates under the provisions of the Voluntary Schools Act, 1897 (60 & 61 Vict. c. 5). Sect. 3 provides "that no person shall be assessed or rated to or for any local rate in respect of any land or buildings used exclusively or mainly for the purposes of the schoolrooms, offices or playground of a voluntary school, except to the extent of any profit derived by the managers of the school from the letting thereof." And this section is not repealed or varied by the Education Act, 1902. Voluntary schools exempt

No person is to be rated to church or poor rates or cesses for any church, district church, chapel, meeting-house, or premises, or for such part thereof, as shall be exclusively appropriated to public religious worship, and which, if not of the established church, are duly certified for the performance of religious worship according to the Acts in force (*s*). Churches and chapels exempt.

It appears that for a very long period, both before and since the decision in *R. v. Metropolitan Board of Works* (*t*), sewers have not been treated as rateable. The position, however, both as regards old and new sewers, has been fully discussed and the law as to the rateability of sewage works, pumping-stations and sewers, has been formulated in the case of *The London County Council v. Erith* (*u*). The London County Council were owners of land and premises consisting of a pumping-station and works used as part of the metropolitan sewage system. So long as the land and premises were used as part of the sewage system they were incapable

(*r*) *Bell v. Crane* (1873), L. R. 8 Q. B. 481.

(*s*) 3 & 4 Will. 4, c. 30, s. 1. Any parts of such premises, &c. which are not so exclusively appropriated, and from which rent or profit is received, are still rateable (*ibid.*), unless they or any vestry rooms, &c. be used for Sunday or infant schools, or for the charitable education of the poor: *Ibid.* s. 2.

(*t*) *R. v. Metropolitan Board of Works* (1868), L. R. 4 Q. B. 15.

(*u*) *London County Council v. Erith*, [1893] A. C. 562.

of yielding a profit and the council were the only possible tenants. The council were also owners of outfall sewers constructed, not underground, but in an embankment erected on land purchased for that purpose and previously rateable. It was held by the House of Lords that the true test of beneficial occupation was not whether a profit could be made, but whether the occupation was of value, and that, though the council could not under statute legally be tenants, they ought to be taken into account as possible hypothetical tenants for the purpose of determining the possible rateable value of the premises they owned and occupied, and that the pumping-station and outfall sewers were properly rateable.

In a more recent case (*x*) the Court of Appeal have held that it must be taken that the authorities which decided that certain underground sewers of public bodies were not liable to be rated are not based on sound principle, and are to be regarded as anomalies in rating law. And it was held that in order that a new sewer which is *prima facie* rateable may escape from such rateability it must fall strictly within the limits of the authorities by which the exemption was established, that is to say, it must not occupy or affect the surface, and no payment must be made to its owners for the use of it by others.

Owners, when
rateable.
Small
tenements.

The Small Tenements Act (*y*), with respect to the rating of small tenements, and all local statutes, so far as they relate to the rating of owners instead of occupiers, are repealed by the Poor Rate Assessment and Collection Act, 1869 (*z*). By sect. 3 of the latter Act, when the rateable value of any hereditament, which includes a dwelling-house, does not exceed in the metropolis 20*l.*, in Liverpool 13*l.*, in Manchester or Birmingham 10*l.*, and elsewhere 8*l.*, and the owner is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates for not less than a year, and to pay the poor rates whether the premises are occupied or not; and by sect. 4, where the vestry of any parish has ordered that the owners of such hereditaments shall be rated instead of the occupiers, the overseers are to rate the owners; and, by sect. 13, every owner of any hereditament, for the rates of which he has become liable under sects. 3 and 4, is to have the same right of appeal (subject to the same conditions and consequences) against the valuation lists and the poor rates as if he were the occupier thereof.

Compound
tenements.

Appeal.

Small tene-
ments.

The owner of a house, all the separate rooms of which are let out to separate tenants, who used the street door, passages, &c. in common, the owner himself occupying no part of it, and

(*x*) *Ystradufodwg and Pontypridd Main Sewage Board v. Newport Assessment Committee*, [1901] 1 K. B. 406; and see also the judgment of Channell, J., in the court below, [1900] 1 Q. B. 365.

(*y*) 13 & 14 Vict. c. 99.

(*z*) 32 & 33 Vict. c. 41.

being rated at the time of the passing of the 30 & 31 Vict. c. 102, to the poor rate in respect of the whole house, as the owner instead of the occupier, under the Small Tenements Act, 13 & 14 Vict. c. 99, was held to be within the exception to the 30 & 31 Vict. c. 102, s. 7, which provides that, in boroughs, when the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner . . . shall be rated . . . to the poor rate, and was held rateable instead of the occupiers (*a*).

As to the mode of arriving at the net annual value of small tenements, see *R. v. Overseers of Bilston* (*b*).

Advertising stations and hoardings are now rateable under the Advertising Stations (Rating) Act, 1889 (52 & 53 Vict. c. 27). Sect. 2 of that Act defines who is an owner for the purposes of the Act; sect. 3 deals with land used temporarily or permanently for the exhibition of advertisements, but not otherwise occupied, and enacts that the person who shall permit the same to be so used, or (if he cannot be ascertained) the owner, shall be rateable in respect thereof. Sect. 4 provides that where land already rateable is used for advertising purposes, the gross and rateable value of such land shall be so estimated as to include the increased value from use for advertising. Sect. 5 deals with the powers of a local authority with respect to hoardings erected temporarily upon a highway.

Lands, houses or buildings belonging to any society instituted for the purposes of science, literature, or the fine arts exclusively, and occupied by it for the transaction of its business, and for carrying into effect its purposes, are exempted from local rates and taxes: provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money between any of its members; and provided that such society shall obtain the certificate of the barrister-at-law for the time being appointed to certify the rules of friendly societies (*c*).

Exemption of lands, houses, &c. occupied for the purposes of science, literature, or the fine arts.

The barrister is to give his certificate on each of three copies of the laws, rules and regulations for the management of the society, that the society is entitled to the benefit of this Act, or shall state in writing the grounds on which such certificate is withheld.

As to the certificate of the barrister that the society is entitled to the benefit of the Act.

If the certificate is granted, one of such copies is then to be returned to the society, another is to be retained by the certifying barrister, and the third is to be transmitted to the clerk of the peace of the county or borough, as the case may be, and shall be by him laid before the next sessions or sitting of the

(*a*) *Stamper v. Overseers of Sunderland* (1868), L. R. 3 C. P. 388.

(*b*) (1865), 35 L. J. M. C. 97.

(*c*) 6 & 7 Vict. c. 36, s. 1.

Allowance of certificate by quarter sessions.

recorder after the transmission to him, and the recorder or sessions are required to allow the same without motion, and order the same to be filed (*d*). In case of alteration of any of the rules so certified, they are to be submitted again to the barrister for a fresh certificate or refusal (*e*).

In case of refusal to certify, the laws, rules, &c. of the society, together with the reasons for the refusal, may be submitted to the sessions or recorder, who are at liberty to cause them to be filed, and such filing is to have the same effect as a certificate (*f*).

Appeal lies against the certificate to quarter sessions.
To what sessions.

By 6 & 7 Vict. c. 36, s. 6, any person or persons assessed to any rate from which any society shall be exempted by this Act, may appeal from the decision of the barrister in granting such certificate to the quarter sessions, within four calendar months next after the first assessment of such rate made after such certificate shall have been filed as aforesaid, or within four calendar months next after the first assessment of such rate made after such exemption shall have been claimed by such society, such appellant first giving to the clerk or secretary of the society in question, twenty-one days previously to the sitting of the said court, notice in writing of his intention to bring such appeal, together with a statement in writing of the grounds thereof, and within four days after such notice entering into a recognizance before some justice, with two sufficient sureties, to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the recorder or justices at such quarter sessions; and at such quarter sessions such recorder or justices shall, on its being proved that such notice and statement have been given as aforesaid, proceed to hear such appeal according to the grounds set forth in such statement, and not otherwise, and if the certificate of the said barrister shall appear to him or them to have been granted contrary to the provisions of this Act, shall and may annul the same, and shall and may, according to their discretion, award such costs to the party appealing or appealed against, as he or they may think proper, and his or their determination concerning the premises shall be conclusive and binding on all parties to all intents and purposes whatsoever (*g*).

Exemption of scientific, literary and fine arts societies.

Notwithstanding a certificate granted by the barrister to a society, and the appeal clause, it is still open to the parish authorities to rate a building belonging to the society which does not, in fact, come within the benefit of the Act, and enforce the rate, for the certificate whilst made a condition precedent to the claim of exemption is not conclusive proof of a right thereto (*h*).

(*d*) 6 & 7 Vict. c. 36, s. 2.

(*e*) *Ibid.* s. 3.

(*f*) *Ibid.* s. 5.

(*g*) *Ibid.* s. 6.

(*h*) *R. v. Phillips* (1848), 17 L. J. M. C. 83.

The appeal is in time if entered against the certificate of the barrister, which allowed the exemption, within four months after the first assessment made after formal notice of the granting and filing the certificate had been given to the parties who made the rate, though this was some months after the filing of the certificate (*i*).

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 3 (xv), there was transferred to the county council the administrative business of the justices of the county in quarter sessions assembled, that is to say, all business done by the quarter sessions or any committee appointed by the quarter sessions in respect of the registration of rules of scientific societies under 6 & 7 Vict. c. 36. The registration of rules would not, it is presumed, include the right of appeal given under sect. 6 of 6 & 7 Vict. c. 36, and in that case the appeal would continue to lie now, as formerly, to the quarter sessions.

The Birmingham News-Room (*k*), the Manchester Concert Hall (*l*), the Portico at Manchester, established as a library and news-room (*m*), the Manchester Athenæum, where a chess and gymnastic club were held (*n*), were none of them exempt (*o*). The Birmingham Library (*p*) and the London Library (*q*) were also held exempt as societies for literary purposes exclusively, and supported by voluntary contributions, whilst the United Service Institution was held rateable on the ground that the institution was founded for the advancement of the profession of arms, which enables it to be used for other purposes than those of science (*r*). In the case of the Linnean Society, the society was admitted to be instituted exclusively for scientific purposes, and the main objection urged to the exemption was that the subscriptions were not voluntary (*s*). So the Bradford Library and Literary Society (*t*), and the Liverpool Library, were also exempted (*u*).

The Working Men's Educational Union, established in St. Martin's-in-the-Fields, was held not to come within the

What places within the exemption.

What places not within the exemption.

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- (*i*) *R. v. Pocock* (1846), 15 L. J. M. C. 132.
 - (*k*) *R. v. Phillips*, *sup.*
 - (*l*) *R. v. Brandt* (1851), 20 L. J. M. C. 119.
 - (*m*) *R. v. Gaskell* (1851), 21 L. J. M. C. 29.
 - (*n*) *R. v. Ogden* (1851), 18 L. T. 74.
 - (*o*) *R. v. Overseers of Manchester* (1851), 20 L. J. M. C. 113.
 - (*p*) *Ex parte Overseers of Birmingham, In re Birmingham New Library* (1849), 18 L. J. M. C. 89.
 - (*q*) *Earl of Clarendon v. St. James, Westminster* (1852), 20 L. J. M. C. 213.
 - (*r*) *R. v. St. Martin's-in-the-Fields* (1852), 21 L. J. M. C. 53.
 - (*s*) *Churchwardens of St. Anne v. Linnean Society* (1854), 23 L. J. M. C. 148.
 - (*t*) *R. v. Bradford Library* (1858), 28 L. J. M. C. 73; *sub nom. Bradford Literary Society v. Bradford Churchwardens*, 1 E. & E. 88.
 - (*u*) *Liverpool Library v. The Mayor of Liverpool* (1860), 29 L. J. M. C. 221.

statutable definition, inasmuch as some of the purposes for which it was instituted could not be connected with science, literature, or the fine arts, the direct and immediate object being "the elevation of the working classes" (*x*).

What societies
not exempt
as scientific,
literary or
fine arts
societies.

The Religious Tract Society, instituted for the diffusion of religious principles and sentiments, though by literary means, is not within the exemption (*y*); and the British and Foreign School Society, instituted for the purposes of education, is not entitled to the exemption, though the object is to be gained by scientific and literary means (*z*). The Zoological Society (*a*), the Russell Institution, Bloomsbury (*b*), and the Cambridge Philosophical Society, were also held rateable (*c*).

A society otherwise within the exemption will lose its exemption if its rooms be let out for public meetings and exhibitions unconnected with the objects of the society, though the funds arising therefrom be used for the purposes of the society, and even if part of the premises be sub-let to other societies also within the exemption (*d*); but the accidental use of the rooms for a concert for a charitable object will not affect the right to exempt (*e*).

Such society must be supported wholly or in part by voluntary contributions, and this is satisfied by annual contributions commenced of the subscriber's own choice, and continued and withdrawn at pleasure, that is, without subjecting the party to any legal liability or forfeiture beyond that of foregoing a participation in the pleasure or profit, scientific, literary or artistic, in respect of which they have been made, and it is not further necessary that it should be gratuitous, and bring no return of any kind to the contributor (*f*).

Where the society by its laws may not make any dividend, gift, division or bonus in money unto or between any of its members, a rule by which every subscriber had the power of transferring his property in the library by any of the methods "by which personal property is usually transferred to any person who shall submit to the laws of the society" is no contravention of the enactment, and the Act does not apply to a division of the common stock on the dissolution of the

(*x*) *Scott v. The Overseers of St. Martin's-in-the-Fields* (1855), 25 L. J. M. C. 42.

(*y*) *R. v. Jones* (1846), 15 L. J. M. C. 129.

(*z*) *R. v. Pocock* (1846), 15 L. J. M. C. 132.

(*a*) *Vestrymen of St. Marylebone v. The Zoological Society* (1854), 23 L. J. M. C. 139.

(*b*) *Governors of Russell Institution v. Vestrymen of St. Giles* (1854), 23 L. J. M. C. 65.

(*c*) *Purchas v. Holy Sepulchre, Cambridge* (1851), 24 L. J. M. C. 9.

(*d*) *Purvis v. Traill* (1849), 18 L. J. M. C. 57.

(*e*) *R. v. Brandt* (1851), 20 L. J. M. C. 119.

(*f*) *Ex parte Overseers of Birmingham, Re The Birmingham New Library* (1849), 18 L. J. M. C. 89; *Earl of Clarendon v. St. James, Westminster* (1852), 20 L. J. M. C. 213.

society, but speaks of laws which are to operate on the society as a continuing body (*g*). But it is not sufficient, in the absence of any law prohibiting the making of any dividend or bonus, that no dividend has in fact ever been made, or that the making it would be altogether hostile to the constitution and spirit of the society (*h*); and, *semble*, the Religious Tract Society is not exempt from rating under the Act (*i*).

3. Principles upon which the Rateable Value may be estimated.

The 43 Eliz. c. 2, s. 1, requires the overseers of every parish to raise, "by taxation of every inhabitant," &c., and "of every occupier of" various kinds of real property, and, *inter alia*, of "lands in the parish, in such competent sum as they shall think fit," a stock for setting the poor of the parish to work, and for the relief of the poor of the parish. Though the words of this enactment might seem to give the overseers a discretion to tax each inhabitant in such arbitrary sum as they might think fit, it has long been settled that the taxation of the different persons must be equal and in proportion to the value of their respective means. From Dalton's County Justice (*k*), this was determined very shortly after the statute passed. It has always been so held, and the legislature, by the Parochial Assessment Act (*l*), has affirmed this principle by enacting, that no rate shall be valid unless made upon an estimate of the net annual value of the several hereditaments rated thereunto, that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent, and this principle is affirmed by the Union Assessment Committee Act, 1862 (*m*).

Of the principles of valuation.

Parochial Assessment Act.

The standard of value adopted by the legislature is the value of the property to the owner, whether it remains in his own occupation or is let to a tenant. Where the property is actually let, the actual rent is the best criterion of value, unless it can be clearly shown that that is too small, as, for instance, that the letting had been a number of years ago,

(*g*) *Ex parte Overseers of Birmingham, sup.*

(*h*) *R. v. Jones* (1816), 15 L. J. M. C. 129.

(*i*) *Ibid.*

(*k*) Page 148 (Ed. 1697).

(*l*) 6 & 7 Will. 4, c. 96.

(*m*) 25 & 26 Vict. c. 103, s. 15.

and that the profits to be made had very materially increased or diminished since (*n*).

In order, therefore, that a valid rate may be imposed, it is essential that the occupation be of value beyond what is required to maintain the property; for if the occupation be of so little value that the hypothetical tenant (under the Parochial Assessment Act) would either give no rent, or a rent which, after deducting the average annual expense of maintenance, would leave no overplus, there is nothing to rate (*o*).

Unproductive
land.

So, where the occupation of land is subject to rights of *profit à prendre* which exhaust the whole value of or interest in the land, there is no occupation of a rateable value. Thus, where the corporation of Lincoln were rated in respect of Holmes Common as lords of the manor of the city of Lincoln in whom the soil was vested, and the resident freemen of the city of Lincoln, before and since the Municipal Corporation Act, were entitled to stock the common with two head of cattle each, and the entire value of the common was exhausted by these rights, and the corporation which appointed a commons warden, and had the right to inflict certain fines for illegal stocking were losers by reason of the expenses attaching to the exercise of such manorial rights, and had not any fund out of which to pay these poor rates, for the borough fund was not raised for that purpose, it was considered that the corporation had practically no interest in the land which could be rated (*p*).

The Lord Chief Justice in his judgment distinguished the case from *Jones v. The Mersey Docks* (*q*), because, in the latter case, it was held that the trustees might be liable if they did not take even sixpence of profit to themselves, because they could stop the amount of the rates out of the money in their hands; and Blackburn, J., said that when there is such an occupation as would produce to the tenant such a profit as that an actual tenant would pay a rent in respect of it, the tenement may be assessed to the poor rate. The rate must be based on the estimates of the rent which would be paid and received whether the profits be handed over to a charity or kept by the occupier or used for some other purpose; but there must be some rent which the hypothetical tenant would be willing to pay, and here the corporation are the occupiers of the land, but the benefit of the occupation is solely derived from the grass which the freemen have the right of feeding their cattle upon.

(*n*) *R. v. Chaplin* (1831), 1 B. & Ad. 926.

(*o*) *Jones v. Mersey Docks and Harbour Board* (1864), 35 L. J. M. C. 1, per Blackburn, J.; see also per Lord Westbury, *ibid*.

(*p*) *The Corporation of the City of Lincoln v. The Overseers of Holmes Common* (1867), L. R. 2 Q. B. 482.

(*q*) *Supra*.

But the true test of beneficial occupation has now been held to be not whether a profit could be made, but whether the occupation was of value (*r*).

If houses and other buildings, either with or without land, are let to a tenant, and the tenant agrees to take upon himself, either wholly or in part, the repairs and other expenses to which the section refers and which ordinarily fall upon the landlord, no allowance in respect of such repairs and expenses is to be made from the rent, because it is necessary to consider these expenses as added to the rent, which expenses then have to be deducted by the landlord, thus leaving the rent actually paid by the tenant as the amount on which the rate ought to be assessed (*s*).

When tenant does the repairs.

To ascertain the rateable value of a furnished house it must be ascertained what is the rent for the house, and what is the rent for the furniture and tenant's fixtures; what is paid for the use of the furniture and those things which form no part of the rateable premises must be deducted, and the remainder will be the rent for which the house is rateable (*t*).

Furnished house.

By 32 & 33 Vict. c. 41, s. 3, a commission of 25 per cent. may be allowed the owner of small tenements on becoming liable for the rates; and by sect. 4 a deduction or abatement of 15 per cent. is allowed, and by that Act all local Acts relating to the rating of owners instead of occupiers are repealed. When by a local Act the owners of small tenements were empowered to compound for the poor rate in respect of such tenements by the payment of one-half of such rate only, it was contended that in estimating the amount of the deduction to be made from the gross estimated rental for rates and taxes only one-half the sum ordinarily allowed for that deduction in houses not in composition should be allowed, that is to say, where one-fifth of the gross rental was ordinarily deducted only one-tenth should be deducted where the tenement was in composition. It was held, that in estimating the annual value the full usual allowance should be made, and that the landlord claimed to pay a composition ought not to be an element in ascertaining the rateable value (*u*).

Small tenements in composition.

A payment made by a landlord to a waterworks company for the supply of water to a tenement occupied by his tenant, where it was optional with the owner or the tenant to get the supply from other sources, is not a tenant's rate or an expense necessary to maintain the premises in a state to command the probable annual rent, and must not be deducted from the

Necessary expense to be deducted—water rate.

(*r*) *London County Council v. Erith and West Ham*, [1893] A. C. 562.

(*s*) *R. v. Wells* (1867), L. R. 2 Q. B. 542.

(*t*) *Per Blackburn, J., R. v. Lee (Ink.)* (1866), L. R. 1 Q. B. 241.

(*u*) *R. v. Overseers of Bilston* (1865), 35 L. J. M. C. 97.

gross estimated rental of the premises in order to ascertain the net annual value (x). This expense was classed by the court in that case with the cost of food or light, or of candles or gas.

Sewer rate
may be
deducted.

A general sewer rate imposed by commissioners of sewers is a tenant's tax, and so to be deducted in estimating the value of the land rated. And so likewise is an annual tax for the maintenance and cleansing of sewers. And the annual average cost of the maintenance of a sluice and floodgate, by which the land was benefited, and of the maintenance of a sea-wall, which the owner was bound to keep up under a presentment of a court of sewers, may be deducted as expenses necessary to maintain the land in a position to command the rent (y).

Allowance for
renewal of
farm build-
ings or
machinery.

An allowance ought to be made in respect of any contingent or future renewal of farm buildings or machinery, inasmuch as they are, by the effects of the weather and of wear and tear, reducible to a state which will render them unworthy of repair, and necessitates their reconstruction, so that a provision made for a future liability to reconstruct them, involving, as it ought to do, a prudential parsimony as respects all but temporary and indispensable repairs, is an expense which may properly be included among the expenses necessary to maintain an hereditament, consisting in part of subjects perishable, in a state fit to command the rent which it does in fact, while standing and in use, command. There seems also no distinction in principle between a sum annually laid by to make good, when it shall become necessary, an inevitable loss by the destructive agency of time, and a fund laid by for an indemnity against loss by fire, storm or other peril insured against (z). Allowances upon this principle are made in the case of railways (a).

Machinery
in water corn
mills.

Mills not in
use rateable as
warehouse for
machinery,
when.

If a mill, containing machinery and other things incidental to the business, such as a cotton mill, silk mill, &c., is stopped or is discontinued to be worked, either from stress of trade and temporarily to await a revival of trade, or upon the retirement from the business of the owner, or by reason of the cesser of the term of the tenant, and ceases to be worked, but is idle only until a fresh tenant or purchaser can be found, the machinery being kept in order and ready for use, it may be rateable as a warehouse or storehouse for the machinery that is in it (b).

But where prior to the making of a rate the owners gave notice to the overseers that they intended to keep certain

(x) *R. v. Overseers of Bilston* (1865), L. R. 1 Q. B. 18.

(y) *R. v. Hall Dare* (1864), 35 L. J. M. C. 17.

(z) *R. v. Wells* (1867), L. R. 2 Q. B. 542, *per* Blackburn, J.

(a) *Great Eastern Rail. Co. v. Haughley* (1866), L. R. 1 Q. B. 166.

(b) *Staley v. Overseers, &c. of Castleton* (1864), 33 L. J. M. C. 178;
Harter v. Overseers of Salford (1865), 34 L. J. M. C. 206.

warehouses unoccupied and to claim exemption from the rates in respect thereof, but the warehouses were advertised to let and continuous shafting remained fixed on the premises, it was held that there was no occupation so as to render the owners liable to be rated in respect thereof (e).

The Poor Rate Exemption Act, 1840 (3 & 4 Vict. c. 89), expressly exempted from rating personal property which up till that date had been rateable, though not in practice often actually rated. But in a recent case certain machinery and plant had been placed upon the premises, but there was no intention of making such machinery part of the soil or hereditaments, and the machinery could be and was taken down and moved as required: it was held that in estimating the rateable value of premises used as a manufactory, machinery and plant placed thereon for the purpose of making them fit as premises for such a manufactory are to be taken into account as enhancing the value of the hereditament, although such machinery and plant remain personal property, and are not physically attached to the premises (d).

Rating of machinery.

Where a steamboat company were rated in respect of land, and a landing place and barges and pier used therewith, it was held that though the barges, &c. were not rateable, yet where a subject is rateable anything which increases its value may be taken into consideration, and that the appellants would be rateable to the poor in respect of the value conferred upon their land by the use of the pier (e).

Pier and landing-stage of steamboat company rateable as land, when.

It was formerly held that a brewery was increased in rateable value by the increased rent a tenant would be willing to pay for the brewery in respect of the goodwill and trade of a number of public-houses whose tenants are under an engagement to purchase all their liquors at the brewery (f); but it is now held that, by reason of the tie, the rateable value of the public-houses is not to be decreased, nor that of the brewery increased (g).

Brewery with tied public-houses.

There has been considerable doubt as to how far evidence of the amount of trade actually done at the house, the rate on which was appealed against, was admissible on the appeal. On the hearing of an appeal against a rate made on a public-house the respondent's counsel proposed, both by cross-examination and by examination in chief,

Evidence as to takings and profits.

(e) *Boottle Overseers v. Liverpool Warehousing Co.* (1901), 85 L. T. 45.

(d) *Tyne Boiler Works Co. v. Longbenton* (1886), 18 Q. B. D. 81; and see also among earlier cases, *R. v. Haslam* (1851), 17 Q. B. 220; *R. v. Guest* (1838), 7 A. & E. 951; *R. v. Birmingham and Staffordshire Gas Light Co.* (1837), 6 A. & E. 634; *R. v. Southampton Dock Co.* (1851), 20 L. J. M. C. 155.

(e) *R. v. Leith* (1852), 21 L. J. M. C. 119.

(f) *Allison v. Overseers of Monkwearmouth Shore* (1854), 23 L. J. M. C. 177, Erle, J., dissenting.

(g) *Overseers of Sunderland v. Sunderland Union* (1865), 34 L. J. M. C. 121; *Bradford-on-Avon Union v. White*, [1898] 2 Q. B. 630.

to give evidence of the amount of the average weekly takings in the appellant's public-house. The evidence was rejected by the justices, and the case carried to the Court of Appeal, which held, that as there was nothing exceptional in the case of a public-house situated as this house was, the ordinary mode of arriving at the rateable value should be adopted, and the evidence being inadmissible was rightly excluded (*h*).

But this decision has been commented upon in a more recent case (*i*), where an appeal to quarter sessions against a rate made on a public-house had been referred to an arbitrator. At the arbitration the respondents proposed to give evidence of the amount of the appellant's weekly takings by cross-examining him. The arbitrator rejected this, on the authority of *Dodds v. South Shields Union*, but held that it was right in valuing for the purposes of the poor rate to take into account the existence of the trade done at the house, and dismissed the appeal. The appellant appealed, and ultimately it was held, by the House of Lords, that in assessing the value of a licensed public-house for the poor rate the existence of the licence and the amount of trade which can be, and has actually been, carried on there are elements to be considered in order to arrive at the rent at which the house may reasonably be expected to let. Evidence of these facts is always admissible, and may be necessary where the ordinary evidence of market value by comparison with other public-houses is not to be had. Evidence of profits made is also admissible; but an inquiry into profits should be avoided where possible, because it is regarded as inquisitorial and oppressive. These are not rules of law, but matters of practice and common sense, and it is not expedient to lay down rules about them. And in a more recent case (*k*), on an appeal to quarter sessions, the respondents tendered in evidence certain accounts made up from the books of the appellants, showing the receipts and expenditure of the appellants in the conduct of the business. The appellants objected, but the evidence was admitted. It was held by the House of Lords on appeal that in estimating the rent at which premises may reasonably be expected to let, the circumstances of the actual occupation are matters to be considered, including the receipts and expenses of the business carried on there (*k*).

(*h*) *South Shields Assessment Committee v. Dodds*, [1895] 2 Q. B. 133.

(*i*) *Cartwright v. Sealecoates Union*, [1900] A. C. 150.

(*k*) *Mersey Docks and Harbour Board v. Birkenhead Assessment Committee*, [1901] A. C. 175.

Formerly, under the 16 & 17 Vict. c. 97, s. 35, no lands or buildings, already or to be hereafter purchased or acquired, under the provisions of this or any former Act, for the purposes of any asylum (with or without any additional building erected or to be erected thereon) shall, while used for such purposes, be assessed to any parochial or other local rates at a higher value or more improved rent than the value or rent at which the same were assessed at the time of such purchase or acquisition. But this enactment was repealed by 52 & 53 Vict. c. 41, which was itself repealed by 53 & 54 Vict. c. 5, by sect. 263, of which it is enacted that lands and buildings already or to be hereafter purchased or acquired for the purposes of any asylum, and any additional building erected or to be erected thereon, shall, while used for those purposes, be assessed to county parochial district and other rates made after the commencement of that Act on the same basis and to the same extent as other lands and buildings in the same parish, township or district.

Lunatic
asylums.

In the first edition of this book a considerable space was allotted to the consideration of the principles of rating as applied to railways. That matter is omitted from the present edition and the subject is not dealt with. The editors feel that in the limited space at their disposal it is impossible to treat the subject with the fulness and detail which it demands, and they have, therefore, omitted all reference to it.

Railways.

In estimating the rateable value of a canal, the expense of repairing a tunnel is to be taken as like to the expense of repairing important special works constructed necessarily for the use of the whole of a canal, such as the annual expense of repairing the locks on the canal or an aqueduct carrying the canal across a valley which is distributable on the mileage principle over the whole canal (*n*); but the expense of repairing the banks of the canal is a local expense, and to be deducted from the earnings in the parish (*o*).

Canals.

Expense of
repairs.

A rent or sum of money paid by a railway company to a canal company under a guarantee in a lease to make up a deficiency in the earnings of the canal company, is not to be taken into account in determining the rateable value of the canal (*p*).

Guarantee by
a railway
company to
make up a
deficiency.

(*n*) *R. v. Coventry Canal Proprietors* (1859), 28 L. J. M. C. 102.

(*o*) *R. v. Oxford Canal Co.* (1829), 10 B. & C. at p. 176.

(*p*) *R. v. Lapley Overseers, &c.* (1868), 9 B. & S. 568. See as to railways, *Newmarket, &c. Rail. Co. v. St. Andrew-the-Less, Cambridge* (1854), 3 E. & B. 94.

Docks.

With respect to the rateability of docks communicating with one another, forming one concern and constituting one source of profit, but extending into more parishes than one, and where a ship having once paid the dues might go into any of the docks, all the docks being virtually one dock: it was held, that inasmuch as it was impossible to apply the parochial principle of apportioning the actual receipts of the part in the parish to that parish, it was the proper course to apportion the receipts according to the area, according to the proportion which the area of the docks within that parish bore to the entire area of the docks (*q*); but these same docks having been altered and added to, it was held that the rateable value should, wherever it is possible, be ascertained by attributing to each parish the receipts earned and the expenses incurred in that parish (*r*). And the parochial principle has been upheld in a recent case in which it was held that separate buildings belonging to a single concern whose operations extend over a number of rating areas are rated separately to the area in which they stand (*s*). So, signal boxes on a railway must not be treated as part of the running line, but as part of the indirectly productive portion of the railway, and are consequently to be separately assessed in the respective parishes in which they are situate (*t*).

Expense of steam-tug.

The expenses of a steam-tug for the purpose of towing vessels in and out of dock, as part of the floating capital used in carrying on the concern, were allowed in deduction from the gross receipts, as its earnings were allowed to increase them (*u*). Directors' fees were also allowed in this case as a proper deduction from the gross receipts (*u*); but where the Nunhead Cemetery and the Highgate Cemetery belonged to one company, and had one board of direction and offices in London, a proportionate part of the expense was not allowed to be deducted from rateable value of Nunhead (*x*).

Expenses of direction, &c.

Income tax.

Income tax, in respect of the profits of a supposed tenant of the docks, not being a tax in respect of the subject-matter rated or operating directly in diminution of the rent, is not an item to be considered as a deduction (*y*).

Mode of making deductions for rates and taxes.

In rating a dock the net rateable value of the dock is to be ascertained by taking the annual receipts, less the amount of the disbursements and several deductions, amongst which is an allowance for rates and taxes. The balance being struck, the amount of the rates and taxes upon the net rateable value

(*q*) *R. v. Hull Dock Co.* (1852), 15 Q. B. 325.

(*r*) *Sculcoates Union v. Hull Dock Co.*, [1895] A. C. 136.

(*s*) *Melbourne Tramway and Omnibus Co. v. Mayor, &c. of the City of Fitzroy*, [1901] A. C. at p. 171.

(*t*) *Midland Railway v. Pontefract Union*, [1901] 2 K. B. 189.

(*u*) *R. v. Southampton Dock Co.* (1851), 20 L. J. M. C. 155.

(*x*) *R. v. St. Giles, Camberwell* (1850), 19 L. J. M. C. 122.

(*y*) *R. v. Southampton Dock Co.*, *sup.*

were to be deducted, and the rates and taxes to be calculated on that value, and not merely on the balance of profits (z).

The principle of rating a gas company may be best illustrated by the following case (a):—A gas company was rated to the poor in respect of property lying in five townships. It consisted of lands and buildings, with retorts and furnaces and pipes attached, used for the making and manufacturing of gas, of buildings used as storehouses, of buildings used as offices, and of land occupied by mains and pipes. The first, second and third descriptions of property were in the rating township and another township, but the mains and pipes extended into the five townships. The mains and pipes were partly laid in land belonging to the company and partly in pursuance of the provisions of the Company's Act of Parliament under the streets and highways of the town. Some of the mains were used to convey the gas from the works to the streets, where it was distributed, and the rest of the mains and pipes for distributing the gas through the streets. The former of these two sets of mains might, if expedient, be laid in other places. The township ascertained the net annual rateable value of the property in their township by the following process. The rateable value of the whole of the works lying in all the townships was first determined by taking from the company's printed accounts last previously published for the information of the shareholders the sum of the annual gross receipts for the sale of gas, and of the residuary products from the materials after the gas has been made, and for the hire of gas meters and fittings, and work done, and deducting therefrom the gross expenditure for the same year incurred in producing such receipts. The following deductions were made: first, a sum for tenants' profits and interest on capital; secondly, a sum on account of tenants' rates and taxes, and the annual average cost of the repairs and renewal and insurance of the buildings of the stations, and of plant as necessary to maintain them in a state to insure the above receipts; thirdly, a sum on account of the renewal of the mains; and the sum remaining was taken to be the true estimate of the net annual value of the works in the hands of the company. From this value was then deducted a sum on account of the net rateable value of the stations, works and buildings lying in the rating township alone, and as contributing indirectly to the profits rateable only to the poor within the township where they lie. The remainder after this deduction was distributed among the several townships into which the mains extended, by apportioning

Gas company.

Gasworks.

(z) *Tyne Improvement Commissioners v. Churchwardens, &c. of Chirton* (1862), 32 L. J. M. C. 192.

(a) *R. v. Sheffield United Gas Co.* (1863), 32 L. J. M. C. 169.

Gasworks.

to each of them so much as represented the extent of the mains they contained. The amount thus apportioned to the rating township was added to the rateable value of the stations and lands, and the total of these two sums was taken to be the net annual value of the works within the rating township. And the court said, "as to the mode in which the township has arrived at the value of the entire subject, it seems to us that if the proper allowance for expenses and for tenants' profits and interest on capital has been made, and the proper value has been put on the stations, works and buildings, &c., a proper mode has been adopted for obtaining the rateable value of the remaining property, for we think that what is left after these allowances is the rent which the hypothetical tenant—to adopt the phrase used in *The Queen v. The West Middlesex Waterworks Company* (b)—would give for the rest of the apparatus. . . . The principle on which the stations, works and buildings, &c. are to be valued, as laid down in *The Queen v. Mile End Old Town* (c) and *The Queen v. West Middlesex Waterworks Company* (b), is, that they are to be valued as fixed property deriving some additional value from their capacity of being used as part of the gasworks. But as to the mode in which the entire subject-matter is to be apportioned among the several townships, we think the mode adopted is not correct. It is very true that the mode they propose of dividing according to the extent of the portion in each township has the great advantage of simplicity, and when applied to such a homogeneous subject as the present it probably brings out a result not far from the true one, but we cannot say it is the rule given by the Parochial Assessment Act. The subject-matter which the township has apportioned amongst the five townships consists of mains and pipes, part of which, according to *The Queen v. The West Middlesex Waterworks Company* (b), must be considered as directly and part as only indirectly contributing to the profits, yet the respondents have made no distinction between them. We think we must refer to the judgment in the case of *The Queen v. The West Middlesex Waterworks Company* (b), and require the parties to apply the rule as there laid down as well as they can."

Waterworks.

The principle on which a waterworks company is to be rated in respect of the plant, engine-houses, cottages, buildings, wharfs, mains, land and premises in a parish where no direct profit is earned, but without the buildings in such parish the company could not convey the water raised from the river there to their mains and by their mains to their reservoir in another parish, from whence it was conveyed, by means of mains and

(b) (1859), 28 L. J. M. C. 135.

(c) (1847), 16 L. J. M. C. 184.

service-pipes, to the parishes and places which they were authorized to serve, is that it is to be rated as for "mere land and buildings, with fixtures and machinery attached, and deriving some additional value from their capacity of being applied to such purposes as that of a water company." And such additional value is derived from an increase of demand beyond supply, according to the principle regulating exchangeable value and not by reference to receipts earned in another parish, beyond assuming that they are sufficient to pay for all outgoings including profits on capital (*d*).

Wightman, J., in his judgment (*e*), says: Where an apparatus belonging to one occupier has several parts in several parishes, each parish must rate the part within it upon an estimate of the rent which that part would yield after proper deductions. An hypothetical tenant must be assumed and the terms of such a tenancy are not difficult to be conceived if in the hypothesis some necessary incidents are also assumed to be involved: such as, first, each part of the apparatus is to continue in joint co-operation; no one tenant of an essential part being able to stop his part: secondly, that the title to the required land is permanent, so that there is no risk of being compelled to move fixed capital: thirdly, that there is land in the required quantity and capital to be invested therein and occupants ready to take and work parts yielding profits as tenants at rack-rent, and parts not yielding profit as contractors for remuneration, provided any greater profit can be obtained than is ordinary in such relations. Supposing then the apparatus to be apportioned to several tenants, according to the parts in several parishes, the tenants of the parts directly earning net profits in a parish would be rated by that parish for all the profits earned therein. But the tenants of the parts directly earning no profit would not be liable to be rated in respect of any rent in the ordinary sense—which is profit remaining after all the deductions have been taken from the receipts. But as these parts of the apparatus directly earning nothing, but indirectly conducing to such earnings elsewhere, are assumed to continue in operation, the company, to whose interest such continued operation is essential, must be assumed to pay adequate remuneration to a contractor for land and fixed capital vested therein, together with the labour and skill requisite for the effective continuance of such operation; and this contractor with the company would stand in the relation of occupying tenant to the parish, and the part within the parish would be the rateable subject, and the local rateable value would be such sum as would pay the rent of the land

Waterworks.

(*d*) *R. v. West Middlesex Waterworks Co.* (1859), 28 L. J. M. C. 135; *R. v. Mile End Old Town* (1847), 16 L. J. M. C. 184.

(*e*) *R. v. West Middlesex Waterworks Co.* (*sup.*) at p. 138.

Waterworks. and the profit on fixed capital therein (*e*). So the spring which indirectly contributes to the ultimate profit by water rate was held rateable in the parish where it was situate (*f*).

The Chelsea Waterworks Company having drawn their water from the Thames in the parish of K. into reservoirs and filter beds there, pumped the water from these through pipes laid down in K. and in P. to reservoirs in P., and thence in other pipes in P. to the parish of F., and thence into the company's district where it was distributed. The pumping-engines, pipes and reservoirs were all essential parts of the same apparatus. The rateable value of the portion of the apparatus in P., after the proper deductions had been made, was ascertained by first taking the rateable value of the whole apparatus, then subdividing the amount among the several parishes according to the quantity of land occupied by the apparatus in each parish; but it was held that a wrong principle had been adopted, inasmuch as under it every square foot of land occupied was to be rated at the same rate, without regard to the situation or nature of the land, whether it was originally part of a barren heath or of a market garden, whether it was merely land under a highway, or upon which expensive buildings had been erected for the purpose of converting it into filtering beds or reservoirs (*g*).

Bridge tolls. Where a bridge reaches from one parish into another, the tolls on passing which are paid on one side only, the proprietors are rateable in both parishes as occupiers of land in both (*h*). In his judgment Lord Denman, C. J., says that the approaches stand in the same relation to the bridge as stations and warehouses to railways, reservoirs and wharfs to canals, aqueducts and mains to water supplies, gasometers and mains to gas burners. And the principle for dividing the direct from the indirect sources of profit for rating the indirect sources, and for apportioning the residuary net rateable value among the districts in which the direct source was situate, was explained in *R. v. Mile End Old Town* (*i*); but the court left unanswered the question whether the approaches to the bridge were separately rateable.

Lighthouse—passing tolls. The owner of a lighthouse being rated as occupier in such an annual sum as, with the tolls, it was worth to be rented by a third person, it was held, where the owner did not reside in the parish where it stood, and the tolls paid by vessels passing

(*e*) *R. v. West Middlesex Waterworks Co.* (1859), 28 L. J. M. C. at p. 138.

(*f*) *R. v. New River Co.* (1813), 1 M. & S. 503.

(*g*) *Chelsea Waterworks Co. v. Overseers of Putney* (1860), 29 L. J. M. C. 236.

(*h*) *R. v. Hammersmith Bridge Co.* (1849), 18 L. J. M. C. 85; and see *R. v. Barnes* (1830), 1 B. & Ad. 113.

(*i*) (1847), 16 L. J. M. C. 184. See *R. v. Marquis of Salisbury* (1838), 8 A. & E. 716.

it were not received in the parish or paid in respect of vessels coming within it, that as the tolls did not arise from the building, or from anything connected with it, the rate ought to be reduced to the value of the building if let by itself (*k*).

The general expenses, such as direction and central office expenses of a company which had established two cemeteries, one at H. and the other at N., may not be deducted proportionally from the receipts at N., in estimating the rateable value of the cemetery at N., as such expenses were deemed to be modes of expending the revenue when derived and forming no part of the means necessary to acquire them (*l*).

Cemetery company's general expenses.

With respect to tithes, where land was subject to a corn-rent in lieu of tithes, directed by a local statute to be paid to the vicar "clear of all parochial taxes, rates, dues and assessments whatever," it was held that the occupiers of the land charged with the payment of the corn-rent were not entitled to have the amount of the corn-rent deducted in estimating the net annual value of the property (*m*) liable to the poor rate under 25 & 26 Viet. c. 103, s. 15.

Corn-rent in lieu of vicarial tithes.

The amount receivable in respect of the tithe commutation rent-charge is rateable under the Parochial Assessment Act, but as the language of the Act is literally applicable in all its particulars only to corporeal hereditaments, it is necessary to proceed by analogy, which analogy must be as large and liberal as is necessary to effectuate substantial equality in the assessment, and at the same time compatible with the maintenance of the principle (*n*). The deductions, therefore, from the amount include the expenses of collecting the rent-charge, with law expenses to enforce payment, and losses by ultimate non-payment. The poor rate also is a tenant's rate, and such rate and the general rate, under the Metropolis Local Management Act (*o*), and the lighting rate, under the same Act and section, are to be deducted; but the sewers rate, imposed by the same section of the same Act, is not payable by the owner of the charge, and therefore not to be deducted by reason of the exemption clause in sect. 164. So the land tax, not being a usual tenant's rate or tax, is not to be deducted. The tenant's property tax and the tenths may also be deducted (*p*); but as

Tithe commutation rent-charge.

Deductions from amount of rent-charge.
Poor's rate.

Lighting rate.
Sewers rate.

Land tax.
Property tax.

(*k*) *R. v. Fowke* (1826), 5 B. & C. 814; *R. v. Coke* (1826), 5 B. & C. 797. See *R. v. Earl of Durham* (1859), 28 L. J. M. C. 232. And these cases are approved in the most recent case: *Commissioners of Port of Lancaster v. Burrow-in-Furness*, [1897] 1 Q. B. 166. But as to exemption from rating of certain lighthouses, see Merchant Shipping Act, 1894 (57 & 58 Viet. c. 60), s. 731.

(*l*) *R. v. St. Giles, Camberwell (Inh.)* (1850), 19 L. J. M. C. 122.

(*m*) *Hackett v. Churchwardens, &c. of Long Bennington* (1864), 33 L. J. M. C. 137.

(*n*) *R. v. Goodchild* (1858), 27 L. J. M. C. 233.

(*o*) 18 & 19 Viet. c. 120, s. 161.

(*p*) But as to deduction of property tax, see the decision in *R. v. Southampton Dock Co.* (1851), 20 L. J. M. C. 155, *ante*, p. 628.

Queen Anne's
Bounty.

Tithes.
No deduction
for the em-
ployment and
payment of
curates.

Tithe com-
mutation
rent-charge.

first fruits and tenths are calculated on the whole *annui proventus*, and not on the tithes only, the allowance in respect of the rate on the rent-charge must only be in the proportion which this bears to the whole *annui proventus*. The interest on a sum of money borrowed from Queen Anne's Bounty, for the purpose of re-building the parsonage-house, and charged on the rent-charge by way of mortgage, cannot be deducted; and it seems to be left as a question of fact for the sessions whether a lessee, under the circumstances of each case of the rent-charge, would require any and what inducement to take in the shape of profit beyond the expenses of collecting, with law expenses, and sum to cover loss by bad debts (*q*).

The rateable value of tithes, or a rent-charge in lieu of tithes, is not to be affected by the mode in which the incumbent disposes of them. Its value, therefore, is not to be reduced because he applies a portion to the stipends of his curates, whether the employment of such curates be necessary to the adequate discharge of his pastoral duties or not (*r*). The case of *The Queen v. Goodchild* (*s*) had been a decision to the contrary; but in *R. v. Inhabitants of Sherford* (*t*), the court held that that case had been overruled by the decision of *Jones v. Mersey Docks Co.*, in the House of Lords (*u*). So, again, the rector of a parish who has voluntarily charged the tithe rent-charge with the perpetual payment of an annual sum towards the stipend of the incumbent for the time being of a new ecclesiastical district, formed under the statutes on that behalf, partly of a part of the parish, is not entitled to have the sum so charged deducted in assessing the tithe rent-charge to the poor rate (*x*); and a lessee of a rent-charge charged under similar circumstances stands in the same position (*y*). This latter case, and *R. v. Inhabitants of Sherford* (*z*), were referred to and approved of by the Court in *R. v. Rhymney Railway Co.* (*a*).

And following on the decision in *Lawrence v. Tolleshunt Knights*, it was held that where a rector granted to the incumbent and his successors of a newly-formed parish by way of endowment, with the sanction of the ecclesiastical commissioners, a rent-charge upon the rectory, and the glebe lands and tithes, or tithe commutation rent-charge with a power of entry and distress, the grantee was not assessable to the poor rates so long as the amount was paid without an actual entry,

(*q*) *R. v. Goodchild* (1858), 27 L. J. M. C. 233.

(*r*) *R. v. Sherford (Inh.)* (1867), L. R. 2 Q. B. 503.

(*s*) *Supra*.

(*t*) *Ubi supra*.

(*u*) (1867), 35 L. J. M. C. 1.

(*x*) *Lawrence v. Tolleshunt Knights* (1862), 31 L. J. M. C. 149.

(*y*) *R. v. Groves* (1860), 29 L. J. M. C. 179.

(*z*) *Ubi supra*.

(*a*) (1869), L. R. 4 Q. B. 276.

for the deed did not amount to an assignment of the tithes or tithe rent-charge, but was merely an annuity (*b*).

Coal mines, which were the only class mentioned in the statute of Elizabeth (*ante*, p. 621), are not included in the provisions of 37 & 38 Vict. c. 54, s. 7, and the rateable value is to be ascertained under the provisions of 6 & 7 Will. 4, c. 96. In a recent case (*c*) the appellants contended that the best, and indeed the only fair, method of arriving at the net annual value was that of ascertaining the receipts in the year and then deducting therefrom the expenses, allowances for tenant's capital, &c., in fact rating it like a railway: and the court held that the evidence as to receipts and deductions was admissible, and that the assessment based on such evidence was properly arrived at (*c*).

By the Rating Act, 1874 (37 & 38 Vict. c. 54), s. 7, where a tin, lead or copper mine is occupied under a lease or leases granted without fine, on a reservation wholly or partly of dues or rent, the gross value of the mine shall be taken to be the annual amount of the whole of the dues payable in respect thereof during the year ending on the 31st day of December preceding the date at which the valuation list is made, in addition to the annual amount of any fixed rent reserved for the same, which may not be paid or satisfied by such dues. The rateable annual value of such mine shall be the same as the gross value thereof, except that where the person receiving the dues or rent is liable for repairs, insurance or other expenses necessary to maintain the mine in a state to command the annual amount of dues or rent, the average annual cost of the repairs, insurance and other expenses for which he is so liable shall be deducted from the gross value for the purpose of calculating the rateable value.

Mines.
Tin, lead or copper mines; gross value, how ascertained.

Rateable annual value, what.

In the following cases, viz.:—

- (1.) When any such mine is occupied under a lease granted wholly or partly on a fine; and
- (2.) Where any such mine is occupied and worked by the owner; and
- (3.) In the case of any other such mine which is not excepted from the provision of this Act and to which the foregoing provisions of this section do not apply:

the gross and annual rateable value of the mine shall be taken to be the annual amount of the dues, or dues and rent at which the mine might be reasonably expected to let without fine on a lease of the ordinary duration, according to the usage of the country, if the tenant undertook to pay all tenants'

(*b*) *Freud v. Tolleshunt Knights* (1859), 28 L. J. M. C. 169.

(*c*) *Denaby and Cadeby Colliery Co. v. Doncaster Union* (1898), 78 L. T. 388.

rates and taxes, and tithe rent-charge, and also the repairs, insurance and other expenses necessary to maintain the mine in a state to command such annual amount of dues or dues and rent.

Purser, secretary, &c. to be rated as occupier.

The purser, secretary and chief managing agent for the time being of any tin, lead or copper mine, or any of them, may, if the overseers or other rating authority think fit, be rated as the occupier thereof.

In this section,

What "mine" includes.

The term "mine," when a mine is occupied under a lease, includes the underground workings and the engines, machinery, workshops, tramways and other plant, buildings (not being dwelling-houses), and works and surface of land occupied in connexion with and for the purposes of the mine, and situate within the boundaries of the land comprised in the lease or leases under which the dues or dues and rent are payable or reserved.

"Dues," what.

The term "dues" means dues, royalty or toll, either in money or partly in money and partly in kind, and the amount of dues which are reserved in kind means the value of such dues.

"Lease," what.

The term "lease" means lease or sett, or licence to work, or agreement for a lease or sett, or licence to work.

"Fine," what.

The term "fine" means fine, premium or foregift, or other payment or consideration in the nature thereof.

Lessee, &c. may deduct one-half of rate from his rent, when.

By sect. 8, where any poor or other local rate which at the commencement of this Act any lessee, licensee or grantee of a mine is exempt from being rated to in respect of such mine becomes payable by him in respect of such mine during the continuance of his lease, grant or licence, or before the arrival of the period at which the amount of the rent, royalty or dues is liable to revision or readjustment, he may (unless he has specifically contracted to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty or dues payable by him one-half of any such rate paid by him: provided that he shall not deduct any sum exceeding what one-half of the rate in the pound of such poor or other local rate would amount to if calculated upon the rent, royalty or dues so payable by him.

Right of appeal to owner.

By sect. 9, where any occupier, lessee, licensee, grantee or other person is authorized by this Act to deduct any rate or sum in respect of a rate from any rent, royalty or dues payable by him, then (1) any payment so authorized to be deducted shall be a good discharge for such amount of rent, royalty or dues as is equal to the amount of such payment, and shall be allowed accordingly; (2) any payment so authorized to be deducted may be recovered as an ordinary debt from the person to whom the rent, royalty or dues may be payable; (3) the person receiving the rent, royalty or dues shall have the same right of appeal and objection with reference to the rate, and to the valuation of the hereditament in respect of

which the rate is payable, as he would have if he were the occupier of such hereditament.

A brick-field may be assessed at the sum per acre which a tenant would be willing to pay for it on taking a lease with liberty to consume the soil and clay or brick earth (and without any liability to pay any royalty in respect of the number of bricks made), the royalty being treated as a portion of the rent (*d*).

A brick-field.

By the Rating Act, 1874 (37 & 38 Vict. c. 54), s. 6, where any right of fowling or of shooting, or of taking or killing game or rabbits, or of fishing (hereinafter referred to as a right of sporting), is severed from the occupation of the land, and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of such increase; and every assessment committee, on the application of the occupier, shall certify in the valuation list or otherwise, the fact and amount of such increase.

Rights of sporting.

Where the right is not let.

(2) Where any right of sporting when severed from the occupation of the land is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof.

Where the right is let.

(3) Subject to the foregoing provisions of this section, the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof.

(4) For the purposes of this section, the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right.

This section, therefore, nullifies the effect of the decisions in *Hilton v. Bowes* (*e*), and *R. v. Thurlstone* (*f*), to the effect that a right of shooting in gross severed from the land was not rateable, but leaves an occupier of land, who has let out the right of shooting over it, liable to be rated as he was decided to be by *R. v. Union of Battle* (*g*).

Saleable underwoods were specified in 43 Eliz. c. 2, as rateable property, but by the Rating Act, 1874 (37 & 38 Vict. c. 54), s. 14, so much of the first-mentioned statute is repealed

Saleable underwoods.

(*d*) *R. v. Westbrook* (1847), 16 L. J. M. C. 87; *R. v. Everist*, *ib*.

(*e*) (1866), L. R. 1 Q. B. 359.

(*f*) (1859), 28 L. J. M. C. 106.

(*g*) (1866), L. R. 2 Q. B. 8; *R. v. Williams* (1854), 23 L. T. 76.

as from the date at which the latter Act comes into operation, with respect to the taxation of occupiers of land used for the growth of saleable underwood: provided that such repeal shall not affect anything duly done or suffered before the said date, or any right acquired or liability accrued before the said date, or any legal proceeding or remedy in respect of any such right or liability; and every such legal proceeding or remedy may be carried on and enforced in like manner as if this repeal had not been enacted.

By sect. 13 nothing in this Act shall apply to a mine of which the royalty or dues are for the time being wholly reserved in kind, or to the owner or occupier thereof.

Land used for
plantation or
wood or sale-
able under-
wood.

By sect. 4, the mode of estimating the value, gross and rateable, of land used for a plantation or wood, or for the growth of saleable underwood, is prescribed—

- (a) If the land is used only for a plantation or a wood, the value shall be estimated as if the land instead of being a plantation or a wood were let and occupied in its natural and unimproved state.
- (b) If the land is used for the growth of saleable underwood, the value shall be estimated as if the land were let for that purpose.
- (c) If the land is used both for a plantation or a wood, and for the growth of saleable underwood, the value shall be estimated either as if the land were used only for a plantation or a wood, or as if the land were used only for the growth of the saleable underwood growing thereon, as the assessment committee may determine.

And by sect. 5, where the rateable value of any land used for a plantation or a wood, or both for a plantation or wood, and for the growth of saleable underwood, is increased by reason of the same being estimated in accordance with this Act, the occupier of that land, under any lease or agreement made before the commencement of this Act, may, during the continuance of the lease or agreement, deduct from his rent any poor or other local rate, or any portion thereof, which is paid by him in respect of such increase of rateable value; and every assessment committee, on the application of such occupier, shall certify in the valuation list or otherwise the fact and amount of such increase.

When occu-
pier may
deduct rate
from his rent.

It has been held that the right of sporting was properly taken into account in estimating the rateable value of the land in its natural and unimproved state under sect. 4, subsect. (a), of the Rating Act, 1874 (*h*).

(*h*) *Eyton v. Mold* (1880), 6 Q. B. D. 13.

The word "saleable" in the old Act means destined for sale, and does not mean in a fit state for sale, referring to the time when the underwood is cut (*i*).

The nature and quality of the wood are not to determine what constitutes saleable underwoods, but the mode of cultivation and management, as by being cut down for sale at regular and calculable periods. Thus, if regular crops of stems and shoots are produced, though at long intervals, as ten, fifteen or thirty years, and from wood deemed timber, either at common law or by local custom, such wood is rateable as underwood (*k*); and the occupier of underwoods was rateable at all times in respect of them, although they and the rate must be got at by distributing the profits over that number of years (*l*).

Saleable underwoods, what.

SECTION 6.

OF THE TRIAL OF APPEALS AGAINST POOR RATES, AND THE JUDGMENT OF THE SESSIONS THEREON—AND HEREIN OF AMENDING RATES.

On the trial of an appeal against a poor's rate, the first proceeding is proof by the appellant of service of his notices of appeal, unless such service is admitted by the respondents (*m*). The notice is then read, and any objections arising on the face of it are argued; when these are disposed of, the court will hear and dispose of any motion for adjournment which may be made; but the more ordinary course is to proceed to try the merits. If the ground of appeal be, that the appellant has no rateable property in the parish, the respondent should begin and support the assessment, by showing that the appellant had some property in respect of which he was liable to be rated (*n*); but if the objection is to the amount of the rate only the appellant begins (*o*).

Where the appellant raises other objections to the rate, as to the relative proportions of the assessments on himself and

(*i*) *R. v. Mirfield (Inh.)* (1808), 10 East, 219.

(*k*) *Lord Fitzhardinge v. Pritchett* (1867), L. R. 2 Q. B. 135; *R. v. Newberth North* (1839), 9 A. & E. 815.

(*l*) *R. v. Mirfield, ubi sup.*

(*m*) As to service and waiver of notice, see Sect. 3 of this Chapter, *ante*, pp. 579, 583.

(*n*) *R. v. Newbury (Inh.)* (1791), 4 T. R. 475.

(*o*) Archbold's Poor Law Practice, 9th ed. 252.

others, these being grounds of appeal, may, if stated in the notice, be proved by the appellants before the respondents are heard in support of the rate (*p*).

Notice of objection to the valuation list must be given to the assessment committee.

Before appealing against a rate made in conformity with the valuation list, notice of objection to the valuation list must now be given to the assessment committee, under the 27 & 28 Vict. c. 39, s. 1. And this preliminary step must be taken with respect to each several rate made; and, therefore, where an appeal has been made to the sessions against a rate after failure to obtain relief from the assessment committee, and on such appeal the rate is confirmed subject to a case for the King's Bench Division, it is necessary before appealing against a second rate, made upon the same basis before the judgment of the King's Bench Division on the former case stated has been given, to make a fresh application for relief to the assessment committee, although the list upon which the second rate is made contains precisely the same valuation of the appellant's property as that in the list which has been previously objected to (*q*).

Proof of the making, &c. of the rate.

When the respondents begin their case by putting in the rate from the custody of the parish officers, and proving its allowance and publication, unless these last are admitted either expressly or virtually, by not being included in the notice as grounds of appeal (*r*). The appellant should give notice to the parish officers to produce the rate, so as to enable them to give secondary evidence of its contents by proving them by oral testimony, or by an examined copy, and such notice need not be served till after the sessions commenced (*s*). To enable parties interested to object to a poor's rate on the ground of overrating, every person rated to the relief of the poor of the parish, in respect of which any rate shall be made, may at all seasonable times take copies thereof, or extracts therefrom, without paying anything for the same, any act to the contrary notwithstanding, under penalty of 5*l*. on a person having custody of the rate and refusing to suffer the taking of such copy or extract (*t*).

Valuation list to be produced on appeals.

By sect. 23 of the Union Assessment Committee Act, 1862 (*u*), every valuation list, or a copy (*x*), when approved by the committee, shall be delivered to the overseers of the parish to which the same relates, and shall be preserved at

(*p*) 2 Nolan, 4th ed. 540.

(*q*) *R. v. Great Western Rail. Co.* (1869), L. R. 4 Q. B. 323; *R. v. Justices of Essex*, [1902] 1 K. B. 180; and see *ante*, p. 580.

(*r*) 2 Nolan, 4th ed. 540.

(*s*) *Id.* 541.

(*t*) 6 & 7 Will. 4, c. 96, s. 5, repealing 17 Geo. 2, c. 3, ss. 2, 3, *quoad* the payment to parish officers for inspecting and copying from a poor's rate.

(*u*) 25 & 26 Vict. c. 103.

(*x*) 31 & 32 Vict. c. 122, s. 31.

the like place and in the like custody, and be subject to the like resort thereto, and be delivered over from time to time in like manner as the books are, wherein rates and assessments for the relief of the poor for the same parish are entered, and shall be produced by the overseers before the justices upon application for the allowance of rates, and at the special or general or quarter sessions when any appeal is to be heard, and also at such times and places as the committee may from time to time direct.

The trial of an appeal against a rate proceeds in other respects in the course pointed out in Chap. I., Part III., for the general hearing of appeals. But the decision of the court of quarter sessions, on an appeal against a poor rate, may differ from that required in every other case, as they are not bound either to dismiss the appeal or quash the rate, but are required to amend it where they see just cause, or to give relief in any manner which they think necessary for that object. But if they are of opinion that it is necessary for the purpose of giving relief to the appellant that it should be wholly quashed, they may quash it (*y*).

An order of quarter sessions made on appeal against a poor rate to quash the rate need not go on to direct the overseers to make a new rate under 17 Geo. 2, c. 38, s. 6. The sessions may well do that in another order (*z*). They were indeed allowed to amend in some respects under 43 Eliz. and 17 Geo. 2, as in cases of mere obvious errors of form only, or by reducing the rate of the appellant where he was individually overcharged (*a*).

Order to make a new rate upon quashing of the rate made.

Where on appeal an assessment of a rate is reduced, no order of sessions is necessary to enable the overseers to refund to the appellant any sums paid by him in respect of the rate in excess of the sum at which he was properly assessable under 41 Geo. 3, c. 23, s. 1 (*b*). But the justices had no power to amend by inserting the names of any persons improperly omitted, or extending the rating of persons named, for this obvious reason, that if the justices could so amend, they might affect the rights of parties who were strangers to the appeal, and had not had an opportunity of being heard. The enactment (*c*), therefore, which enables the court to amend by altering the ratings of third persons, requires that notice should be given to all persons interested in the event, and gives them the opportunity of appearing and being heard at the trial of the appeal. If such notices have been given, the

Amending the rate.

(*y*) 41 Geo. 3, c. 23, s. 1; but nevertheless the sum rated is to be paid, and such payment to be deemed on account of the next rate.

(*z*) *R. v. Justices of Hampshire* (1864), 33 L. J. M. C. 104.

(*a*) *R. v. Cheshunt* (1788), 2 T. R. 623.

(*b*) *R. v. Parker* (1857), 26 L. J. M. C. 199.

(*c*) 41 Geo. 3, c. 23, s. 6.

Of amending the rate.

court may therefore, in their discretion, amend the rate as to the rating of such parties, as well as to that of the appellant, or they may quash it. If notices have not been served on the parties objected to, the court must enter and respite the appeal (*d*).

Whether, therefore, the bench shall amend or quash a rate is a question for their discretion; in general, where the errors affect only the individual ratings, they should amend (*e*); but where they affect the general principle or proportion of the rate, as if a given description of property belonging to various inhabitants (*g*), &c., existing within the district, &c., and producing profit, is not rated, they ought to quash; for the burden of proving the extent to which each party interested should be rated is not to be cast on the appellant, as it might entail on him a much greater difficulty than in cases of single omission; and the session has no power to make a new rate in the room of that which is the subject of appeal.

Costs of assessment committee on appeal.

By sect. 3 of the Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), "the costs which the committee may incur in consequence of becoming respondents to such appeal or of having received notice thereof shall, if not recovered from the appellants, as well as any costs the committee may be ordered to pay to the appellants, be paid by the guardians and charged to the common fund of the union, unless the court before whom such appeal is heard shall direct that such costs or any part thereof shall be charged to the parish the rate of which is appealed against."

Where an assessment has been reduced on appeal to special sessions, and the appellant has been granted costs, and the assessment committee appeal to quarter sessions, and the original assessment is restored, quarter sessions has not only power to make an order as regards the costs of the appeal to quarter sessions, but has also power, under sect. 6 of the Parochial Assessments Act, 1836, to deal with the costs in the court below (*h*).

Power to order a valuation of a parish upon hearing an appeal.

On an appeal by overseers against a valuation list, power is given to order a survey or valuation of the parish appealed against. By sect. 33 of the Union Assessment Committee Act, 1862 (*i*), "it shall be lawful for the court of quarter sessions upon any such appeal, instead of hearing the said appeal to adjourn the same, and to order, upon the application of the appellant or respondent in such appeal, a survey or

(*d*) *R. v. Eyre* (1856), 26 L. J. M. C. 14.
(*e*) *R. v. Ambleside* (1812), 16 East, 380, where the objection was applicable to one person only.
(*g*) *R. v. Hull Dock Co.* (1824), 3 B. & C. 516.
(*h*) *R. v. Justices of Cornwall*, [1903] 2 K. B. 178.
(*i*) 25 & 26 Vict. c. 103.

valuation of any of the parishes in respect of which such appeal shall be made, and to fix the next or some subsequent sessions for receiving such survey or valuation and for hearing and determining such appeal; and such court shall also thereupon appoint a proper person to make such survey or valuation, and the person so appointed shall have power, with or without assistants, to enter upon and survey, measure and value the hereditaments liable to be assessed to the rates for the relief of the poor within the parish or parishes mentioned in such order; and such survey and valuation shall be reported to the quarter sessions on adjournment fixed as aforesaid for receiving the same, and the court then and there assembled shall hear and determine the said appeal in the manner hereinbefore set forth."

Costs of appeals against a valuation list are to include the cost of a survey and valuation, if ordered, for by the 34th section of the Union Assessment Committee Act, 1862 (*k*), it is enacted, "that the charges and expenses of any such survey (*i.e.*, the survey mentioned in sect. 33) and valuation so ordered shall be deemed costs in such appeal, and abide the event thereof, and the court before which any such appeal is heard and determined may order the costs in and about the appeal to be paid by either the appellant or the respondent party, as they in their discretion may think fit; but where any appeal is made on the ground that the rateable hereditaments of any parish comprised in the valuation list of such parish are valued beyond the annual rateable value thereof, if the court on such appeal determine in favour of the appellants, such court shall ascertain the costs and charges incurred by such appellants in and about such appeal, and shall order the board of guardians of the union in which such parish is situate to pay the same to the appellants out of the money raised for the common fund for the several parishes in such union."

Costs of valuation if ordered by the court.

An order for the payment of the costs of an appeal against a poor rate, under 17 Geo. 2, c. 38, s. 4, is valid, though it directs the costs to be paid directly to the appellants, notwithstanding 12 & 13 Vict. c. 45, s. 5, and 11 & 12 Vict. c. 43, s. 27 (*l*).

By sect. 11 of the Poor Law Audit Act, 1848 (11 & 12 Vict. c. 91), where appeals are brought at the same time against the poor rates of several parishes which may appear to involve some common principle, it shall be lawful for the overseers or other authorities therein, with the consent of the respective [*vestries*] of such parishes, to enter into an agreement, to be approved of by the [*Poor Law Commissioners*], mutually to bear the costs which may be properly incurred in

Combination of parishes to bear costs of appeals.

(*k*) 25 & 26 Vict. c. 103.

(*l*) *R. v. Huntley* (1854), 23 L. J. M. C. 106.

and about the trial of such appeals on the part of the several respondents as well as the costs of the appellants, if any, which may be awarded against the respondents, in such proportions as shall be fixed and determined with reference to the amount of interest of the several parishes in the question, or otherwise as shall appear just; and the said agreement shall continue binding on the several parishes and their respective overseers in succession until the several appeals shall be finally determined (*m*).

Combination
of guardians
of unions to
bear costs of
appeals.

By sect. 29 of the Poor Law Amendment Act, 1868, where an appeal is brought against the poor rate of a parish in a union, and may appear to involve a principle in which some neighbouring parish has a common interest, it shall be lawful for the guardians of the unions comprising such parishes to enter into an agreement mutually to bear the costs which may be properly incurred in and about the trial of such appeals on the part of the several respondents as well as the costs of the appellants, if any, which may be awarded against the respondents, in such proportions as shall be fixed and determined with reference to the amount of interest of the several unions in the question or otherwise, as shall appear just; and the said agreement shall continue binding upon the several boards of guardians and their respective successors in succession until the several appeals shall have been finally determined (*n*).

(*m*) 11 & 12 Vict. c. 91, s. 11.

(*n*) 31 & 32 Vict. c. 122, s. 29.

CHAPTER V.

OF APPEALS AGAINST ORDERS OF REMOVAL.

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SECTION 1.

OF THE ORDER OF REMOVAL.

THE power of removing paupers was given by 13 & 14 Car. 2, c. 12, which enacts, by sect. 1, "That it shall be lawful, upon complaint made by the churchwardens or overseers of the poor of any parish to any justice of the peace, within forty days after any such person coming (*i.e.*, a poor person coming from one parish to another) to settle in any tenement under the yearly value of 10*l.*, for any two justices of the peace, [*whereof one is of the quorum* (*a*)] of the division where any person or persons that are [*likely to be*] chargeable to the parish shall come to inhabit, by their warrant to remove and convey such person to such parish where he was last legally settled, either as a native householder, sojourner, apprentice or servant, for the space of forty days at the least, unless he

Power to
remove
paupers,
how given.

(*a*) Not necessary under 35 Geo. 3, c. 101.

Order, how
obtained.
By whom.

Where pauper
settled in
parish in a
union.

shall give sufficient security for the discharge of the parish, to be allowed by the said justices;” subject to an appeal by any parties thinking themselves aggrieved, to the next quarter sessions for the county (*b*). The complaint need not be in writing (*c*), nor on oath (*d*), but must be by a majority of churchwardens and overseers (*e*); but the removal of paupers relieved in unions formed under the Poor Law Amendment Act, 1834, and settled in any parish situated in another union, or subject to a board of guardians, and not exempt from removal by reason of any provision of the law, may be obtained by the guardians of the union to which such pauper shall be chargeable, and the order may be addressed to the guardians of the union or parish, or the overseers of the parish, as the case may require, in which such pauper shall be settled. And the guardians of such last-mentioned union or parish shall receive such pauper (*f*). And again, by 30 & 31 Vict. c. 106, s. 24, when an order of removal is obtained by the guardians of any union not formed under the Poor Law Amendment Act, 1834, or by the guardians or overseers of any parish not included in any union so formed in respect of a pauper alleged to be settled in some parish included in a union so formed, such order shall be addressed to the guardians of such union, and shall be dealt with in all respects as provided by the Union Chargeability Act, 1865.

This latter enactment appears to supplement and extend the previous statute of 28 & 29 Vict. c. 79, perhaps in consequence of the decision in *R. v. Northwich Union* (*g*), which was to the effect that the power of a parish not within a union formed under 4 & 5 Will. 4, c. 76, to obtain an order of removal, was not affected by 28 & 29 Vict. c. 79. And by 30 & 31 Vict. c. 106, s. 26, when an order of removal is made upon the guardians of any union, its execution may be suspended in like manner as in the case of orders of removal heretofore made in parishes, and with the like requirements, liabilities and consequences.

Where any poor person shall have acquired an exemption from removal in any parish or union, and the parish wherein that exemption shall have been wholly or partly acquired shall have been or shall be added to or separated from a union, such poor person shall continue to have the same

(*b*) As to the present jurisdiction over appeals from parishes in boroughs not being counties of themselves, and having separate quarter sessions, see *ante*, p. 22.

(*c*) *R. v. Bedingham* (1844), 13 L. J. M. C. 75.

(*d*) *R. v. Standish* (1790), Burr. S. C. 150.

(*e*) *R. v. Justices of Bucks* (1843), 12 L. J. M. C. 29; *R. v. Justices of Sussex* (1844), 1 New Sess. Ca. 438.

(*f*) 28 & 29 Vict. c. 79, s. 2.

(*g*) (1867), L. R. 2 Q. B. 383.

exemption from removal as he would have been entitled to if no such addition or separation had taken place (*h*).

The Act of 14 Car. 2, c. 12, has now been altered by 35 Geo. 3, c. 101, which takes away altogether the power of removing within forty days persons likely to become chargeable, but gives the power to remove persons actually chargeable, at any time after they have become so, and before they have actually gained a settlement in the removing parish (*i*).

Persons must be actually chargeable.

By sect. 5 of 35 Geo. 3, c. 101, every person who shall have been convicted of larceny or any other felony, or who appears to two justices of the division wherein he resides upon oath of one witness, to be of evil fame or a reputed thief, not being able to give a satisfactory account of his way of living, shall be considered as a person actually chargeable within the true intent and meaning of 35 Geo. 3, c. 131. And by sect. 20 of the Vagrant Act (5 Geo. 4, c. 83), every person who under the provisions of that Act shall have been convicted as an idle and disorderly person, or as a rogue and vagabond, shall be deemed to be actually chargeable to the parish in which he shall reside within that Act. Again, husbands or fathers, whose wives or children, bastard or legitimate, under sixteen years old, not being blind or deaf and dumb, receive relief, and widows on account of whose children under the age of sixteen relief is given, seem removable on that account by the effect of the Poor Law Amendment Act, 1834 (*k*); but relief to a child of greater age, though unemancipated, is not relief to the parent (*l*).

Grounds of chargeability.

By 9 & 10 Vict. c. 66, s. 4, no warrant shall be granted for the removal of any person becoming chargeable in respect of relief made necessary by sickness or accident, unless the justices granting the warrant shall state in such warrant that they are satisfied that the sickness or accident will produce permanent disability.

Chargeability by reason of sickness.

As the statute does not require that the sickness or accident should in fact produce permanent disability, but merely that the justices granting the warrant should state that they are satisfied that it will do so, it is not a ground of appeal to the quarter sessions that the sickness or accident will not produce such an effect; and if the order contains a statement that the justices are satisfied that the sickness would produce permanent disability, the sessions upon appeal cannot inquire into the fact whether it will do so or not (*m*). So, again, it is only necessary to satisfy the justices at the time of granting

(*h*) 31 & 32 Vict. c. 122, s. 34.

(*i*) *R. v. Amphyll* (1824), 2 B. & C. at p. 853.

(*k*) 4 & 5 Will. 4, c. 76, ss. 56, 57.

(*l*) *R. v. Guardians, &c. of St. Mary, Islington* (1862), 31 L. J. M. C. 233.

(*m*) *R. v. St. Mary and St. Andrew, Whittlesey* (1863), 32 L. J. M. C. 78; and *R. v. Priors Hardwick* (1849), 18 L. J. M. C. 177, *per Pattenon, J.*

the warrant that it will have that effect, and it does not affect the validity of the warrant that at a subsequent time the sickness should appear to them to be curable (*n*). *Lunacy* is sickness, and may produce permanent disability within the meaning of this section (*o*). The section does not apply to pregnancy *per se*, and therefore the woman is removable, and the warrant does not require a statement by the justices to the effect mentioned in the section (*p*); but incurable blindness is sickness within the section, and a warrant for the removal of a pauper suffering from such blindness is bad for not containing a statement by the justices granting it as required by the section (*q*). But an order appealed against on the ground of such omission may, perhaps, be amended under the 11 & 12 Vict. c. 31, s. 6, by the quarter sessions, if it can be shown to the court that sufficient grounds were in proof before the magistrates making the order to have authorized their saying that they were satisfied that the sickness would have the requisite effect (*r*).

Sect. 4 of 9 & 10 Vict. c. 66 applies only to the person removed, and relates to his or her sickness or accident, and not to the sickness or accident of any other person, though such latter sickness may be the cause of the removal, as, for instance, an order for the removal of the wife and children of a pauper, chargeable in consequence of the husband's being compelled by sickness to go into a hospital in another parish, need not contain the statement required by the above section as to his illness (*s*). The order need not negative the relief being made necessary by sickness (*t*).

Unmarried women, being with child, are no longer removable on that ground, as they were before the 4 & 5 Will. 4, c. 76, s. 71, inasmuch as up to that time the bastard on its birth would gain a settlement in the place of its birth; but since that Act the child of any single woman—and these words include the case of a widow (*u*), or married woman, who in her husband's lifetime is pregnant under such circumstances of his absence, as would make the child when born, by law, a bastard; *e.g.*, where the husband is undergoing a sentence of penal servitude or imprisonment (*x*)—is not deemed to be settled in the place of its birth, but, on the contrary, in that of its mother's settlement (*y*).

Of women of
child with a
bastard.

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- (*n*) *R. v. Guardians of Township of Manchester* (1856), 26 L. J. M. C. 1.
 (*o*) *Ibid.*
 (*p*) *R. v. Overseers, &c. of Huddersfield* (1857), 26 L. J. M. C. 169.
 (*q*) *R. v. Bucknell (Inh.)* (1854), 23 L. J. M. C. 129.
 (*r*) *Ibid.*, *per* Lord Campbell, C. J.
 (*s*) *R. v. St. George's, Middlesex* (1862), 31 L. J. M. C. 85.
 (*t*) *R. v. Priors Hardwick* (1849), 18 L. J. M. C. 177.
 (*u*) *R. v. Wymondham* (1843), 2 Q. B. 541.
 (*x*) *R. v. Collingwood* (1848), 17 L. J. M. C. 168; and see *ante*, p. 525.
 (*y*) 4 & 5 Will. 4, c. 76, s. 71, and 39 & 40 Vict. c. 61, s. 35; see *R. v. Tibbenham* (1808), 9 East, 388.

Some relationships prevent actual separation of parties on removals taking place under the poor laws. Thus, children under seven years old must be sent with their mothers for nurture (*z*), and having a settlement in a different parish from the mother cannot be removed from the mother, though with her consent (*a*); nor (under 8 & 9 Vict. c. 117, s. 2) can a wife, deserted by her husband, an Irishman with no settlement in England, be removed in his absence to her place of settlement in Ireland, this section contemplating her removal to the husband's place of settlement only as a member of his family and with him (*b*); but a married woman may be removed to her own or her husband's settlement, unless it is proved as a fact by express evidence that she was living in the same parish with her husband, or that she has been sent to a parish where he is not resident; for the court will not presume that the husband was resident in the removing parish, or that he was not resident in that to which the removal was made (*c*).

When persons may not be separated.

The statute under which the removal of Irish paupers is now regulated is 8 & 9 Vict. c. 117, as amended by 10 & 11 Vict. c. 33; 24 & 25 Vict. c. 76; and 26 & 27 Vict. c. 89. The forms to be used are contained in the schedule to 8 & 9 Vict. c. 117, but the form of warrant as to Ireland is repealed and another form provided by the schedule to 26 & 27 Vict. c. 89. A decision under 8 & 9 Vict. c. 117, s. 2, in the case of a wife deserted by her husband, has been noticed above (*d*). And under these Acts it has been held, that the wife and unemancipated children of an Irishman, all born in Ireland, becoming chargeable to an English parish by reason of the desertion of the husband, cannot, in his absence, or without a summons having issued to him, be removed to the Irish settlement of the wife, being different from that of her husband, under 8 & 9 Vict. c. 117, s. 2. The removal must be to the husband's place of settlement, as members of his family, and with him (*d*). So, unemancipated children born in a parish in England of Irish parents, who have no settlement in England, the mother being dead, and the father having removed to another parish, and then deserted them, are removable, in the absence of the father, or of a summons to him, to the parish of their birth, and

Removal to Scotland, Ireland, the Channel Islands, &c.

(*z*) *Wangford v. Brandon* (1698), Carthew, 449.

(*a*) *R. v. Overseers of Birmingham* (1843), 13 L. J. M. C. 1.

(*b*) *Poor Law Commissioners for Ireland v. The Select Vestry of Liverpool* (1869), L. R. 5 Q. B. 79; *R. v. Leeds* (1821), 4 B. & A. 498.

(*c*) *St. Michael's, Bath v. Nunney* (1722), Stra. 544; *R. v. Iron Acton* (1740), Burr. S. C. 153; *R. v. Stockton* (1833), 5 B. & Ad. 546: see *post*, "Settlement by Marriage."

(*d*) *Poor Law Commissioners for Ireland v. The Select Vestry of Liverpool*, *sup.*

not to Ireland under the statute (*e*). Where a woman has a settlement in Ireland, and marries an Irishman, and is deserted by her husband in England, who has no settlement, the maiden settlement of the wife is thereby revived, and she may be removed thither (*f*), and the children, if any, of the marriage would in such a case be removable with the wife to her settlement (*g*). And so, the unemancipated child of Irish parents, who was born in a parish in England, and subsequently became chargeable to a parish other than the parish in which her parents resided, is removable to the parish of her birth (*h*). So, before this statute, it had been held that the wife and unemancipated children of a Scotchman, who had not deserted his wife, but was living with her, could not, even with his consent, be removed to her maiden settlement, but that all were removable to the settlement of the husband, with him, in Scotland (*i*).

To whom
order to be
directed.

The order of removal should be directed to the guardians of the union in which the pauper has become chargeable and to the guardians of the union or the board of guardians of the parish to which it is proposed to remove the pauper. Formerly the complaint had to be made by the churchwardens and overseers of the poor of a parish; but by sect. 2 of 28 & 29 Vict. c. 79, the guardians of the union now make the complaint; and also by sect. 25 of 39 & 40 Vict. c. 61, the complaint may now be made by the board of guardians of a parish if authorised by the Local Government Board; and by the latter section such a board may defend appeals against orders of removal obtained; and by sect. 3 of 28 & 29 Vict. c. 79, guardians of a union obtaining an order of removal may defend the same on appeal, and guardians against whom an order is made are authorised to appeal against it.

Examination
of a pauper.

Before an order of removal is made, the pauper ought to be summoned and examined as to his settlement; but if it happen that by age, illness, or infirmity, he cannot attend at the meeting of two justices, his examination may be taken by one justice, who may report it to another acting in the same division, and both together may make the order (*k*), and the examination must be taken down in writing, and a copy furnished to the opposite party if applied for (*l*). But it is not essential to the validity of the order that the pauper

(*e*) 8 & 9 Vict. c. 117; *R. v. All Saints, Derby* (1849), 19 L. J. M. C. 14; see also *R. v. Great Clacton* (1820), 3 B. & A. 410.

(*f*) *R. v. Cottingham* (1827), 7 B. & C. 615; *R. v. St. Marylebone* (1851), 20 L. J. M. C. 61.

(*g*) *R. v. Much Hoole* (1851), 21 L. J. M. C. 1.

(*h*) *R. v. St. Giles* (1851), 21 L. J. M. C. 26.

(*i*) *R. v. Leeds* (1844), 5 Q. B. 916; 13 L. J. M. C. 107.

(*k*) 49 Geo. 3, c. 124, s. 4; and see now 11 & 12 Vict. c. 31, s. 3, *post*.

(*l*) Sect. 3, *sup*.

should be examined at all; it may be made on the evidence of others (*m*).

If the pauper, by reason of sickness or infirmity, be unable to travel, the justices making the order may suspend its execution by indorsement on the back (*n*) until such time as it shall appear to them that it can be executed with safety (*o*), and no act of the pauper in the interval, *e.g.*, occupying and renting a tenement of 10*l.* a year, will alter his settlement (*p*); and if circumstances require the suspension as to one member of a family, the order will be suspended also as to others. The costs incurred during the suspension are to be paid by the parish to which the pauper is removed by the principal order, and such costs may be levied by distress and sale of the goods of the parish officers refusing to pay, and not giving notice of appeal within three days after demand; where the charges exceed 20*l.* a right of appeal against them is distinctly given (*q*), and an order of removal made upon the guardians of a union may be suspended in like manner and the costs of maintaining the pauper during the suspension of the order may be recovered by the maintaining union from the guardians of the union upon whom the order is made and may be sued for in the county court (*r*). An order of suspension operates with respect to the condition of all the persons named in it, so that where an order is made for the suspension of an order for the removal of a man and his wife on account of the sickness of the man, and during the continuance of the order the man dies or recovers, but the wife has become sick and unable to travel, the order continues to operate to suspend her removal also (*s*). Returning after actual removal seems no offence since 35 Geo. 3, c. 101; for the pauper may return with means, and not be actually chargeable (*t*).

But by sect. 7 of 28 & 29 Vict. c. 79, if the pauper returns and becomes chargeable to the same union within twelve months from such removal, without the consent of the guardians, he shall be deemed to be an idle and disorderly person within the meaning of the Vagrant Act (5 Geo. 4, c. 83).

As to the appeal against a suspended order, see *post*, p. 658. •

(*m*) *R. v. Everdon* (1807), 9 East, 101.

(*n*) Under 35 Geo. 3, c. 101, s. 2, the suspension of the order can only be made by the justices at the same time as the order of removal itself, the justices being after that time *functi officio*: *R. v. Llanellochid* (1860), 29 L. J. M. C. 102.

(*o*) See *R. v. Oldland* (1836), 4 A. & E. 929.

(*p*) 35 Geo. 3, c. 101, s. 2; *R. v. St. John's, Hackney* (1835), 2 A. & E. 548.

(*q*) *Ibid.*

(*r*) 30 & 31 Vict. c. 106, s. 26.

(*s*) *R. v. Sculcoates* (1868), L. R. 4 Q. B. 33.

(*t*) See *R. v. Barham* (1828), 8 B. & C. 99.

Execution
of the order.

Duplicates of the order should be signed by the magistrates, so as to make two originals (*u*); and one of them should be delivered by the parish officers directed to remove the pauper to the parish officers of the place directed by the order to receive him. The pauper must be safely conveyed to the place named in the order at the expense of the removing parish; and the parish officers of the removing parish are liable to indictment for disobeying the order. The other duplicate should be lodged with the clerk of the peace at the next quarter sessions, there to remain as a conclusive record of the settlement, should no appeal be entered against it.

Abandoning
and super-
seding orders
of removal.

Justices surprised into making an order may, before its execution by removal, supersede it of their own authority, and without consent of the removing parish, by supersedeas under their hands and seals (*x*), or even after, if the pauper had been received back, and notice of appeal had not been given (*y*).

Abandonment
of orders of
removal.

And now by 11 & 12 Vict. c. 31, s. 8, in any case in which an order shall have been made for the removal of any poor person, and a copy or counterpart thereof sent as by law required, it shall and may be lawful for the overseers or guardians of the parish who shall have obtained such order of removal, whether any notice of appeal against such order shall or shall not have been given, and whether any appeal shall have been entered or not, to abandon such order by notice in writing under the hands of such overseers or guardians, or any three or more of such guardians, to be sent by post or delivered to the overseers or guardians as aforesaid of the parish to which such person is by the said order directed to be removed, and thereupon the said order, and all proceedings consequent thereon, shall become and be null and void to all intents and purposes, as if the same had not been made, and shall not be in any way given in evidence in case any other order of removal of the same person shall be obtained.

Costs of aban-
doned order.

Provided always, that in all cases of such abandonment the overseers or guardians of the parish so abandoning shall pay to the overseers or guardians of the parish to which such person is by the said order directed to be removed, the costs which the said last-mentioned overseers or guardians shall have incurred by reason of such order, and of all subsequent proceedings thereon, which costs the proper officer of the court before whom any such appeal (if it had not been abandoned) might have been brought, shall, and he is hereby required, upon application, to tax and ascertain at any time

(*u*) See, as to the inconveniences of the other practice, *R. v. Alnwick* (1821), 5 B. & A. 187.

(*x*) *Pancras v. Rumbold* (1715), Stra. 6; as stated by Bayley, J., 5 B. & A. 486.

(*y*) *R. v. West Riding of Yorkshire* (1842), 2 Q. B. 705.

whether the court is sitting or not, upon production to him of such notice of abandonment, and upon proof to him that such reasonable notice of taxation, together with a copy of the bill of costs, has been given to the overseers or guardians abandoning such order, as the distance between the parishes shall in his judgment require, and thereupon the sum allowed for costs, including the usual costs of taxation which such officer is hereby empowered to charge and receive, shall be indorsed upon the notice of abandonment, and the said notice so indorsed shall be filed among the records of the said court; and if such costs are not paid within ten days after such costs shall have been lawfully demanded, the amount may be recovered in the same manner as penalties or forfeitures are recoverable under 4 & 5 Will. 4, c. 76.

The effect of a notice of abandonment under this section is to take away all further jurisdiction from the quarter sessions over the appeal, and to operate as a stay of proceedings, subject to the right of the appellant to costs up to the time of service of the notice. Therefore, if such notice of abandonment is given after an appeal has been entered and respited, the sessions have no jurisdiction to hear the appeal at the subsequent sessions (z).

Effect of
notice of
abandonment.

By 4 & 5 Will. 4, c. 76, s. 79, no poor person shall be removed or removable under any order of removal from any parish or workhouse by reason of his being chargeable to or relieved therein until twenty-one days after a notice in writing of his being so chargeable or relieved, accompanied by a copy or counterpart of the order of removal of such person, shall have been sent by post or otherwise by the overseers or guardians of the parish obtaining such order, or any three or more of such guardians, to the overseers of the parish to whom such order shall be directed: provided always, that if such overseers or guardians as last aforesaid, or any three or more of such guardians shall, by writing under their hands, agree to submit to such order, and to receive such poor person, it shall be lawful to remove such poor person according to the tenor of such order, although the said period of twenty-one days may not have elapsed; provided also, that if notice of appeal against such order of removal shall be received by the overseers or guardians of the parish from which such poor person is directed in such order to be removed, within the said period of twenty-one days, it shall not be lawful to remove such poor person until after the time for prosecuting such appeal shall have expired, or in case such appeal shall be duly prosecuted, until after the final determination of such appeal (a). And by sect. 80, the overseers or guardians of the parish giving such

Time at which
paupers may
now be re-
moved under
orders.

(z) *R. (or Killymaenllwydd) v. St. Michael's, Pembroke* (1852), 21 L. J. M. C. 79.

(a) As to this, see *R. v. Justices of Sussex* (1865), 34 L. J. M. C. 69.

Power to examine pauper touching his settlement.

Of statement of grounds of removal.

notice of appeal, or their attorney or any other person authorized by them, shall until such appeal shall have been heard and decided, have free access to such poor person at all proper times, for the purpose of examining him touching his settlement; and in case it shall be necessary for the more effectual examination of such person that he should be taken out of the removing parish, such overseers or guardians shall be permitted to remove him therefrom for the time which may be necessary for that purpose: provided always, that the expense of such removal, and of his maintenance during the same, shall be defrayed by the appellant parish. Sect. 2 of 11 & 12 Vict. c. 31 enacts, that instead of the copy of the examinations (which under 4 & 5 Will. 4, c. 76, had formerly to be sent) such notice shall be accompanied by a statement in writing, under the hands of such overseers or such guardians, or any three or more of such guardians, setting forth the grounds of such removal, including the particulars of the settlement or settlements relied on in support thereof: provided always, that on the hearing of any appeal against any order of removal it shall not be lawful for the respondents to go into or give evidence of any other grounds of removal than those set forth in such statement.

As to the reason for this change, see *R. v. Justices of Sussex* (b).

And by 11 & 12 Vict. c. 31, s. 3, the clerk to the justices who shall make any order of removal shall keep the depositions upon which such order was made, and shall within seven days furnish a copy of such depositions to the overseers or guardians as aforesaid of the parish to which the removal is by such order directed to be made, if such overseers or such guardians shall apply for such copy, and pay for the same at the rate of two pence for every folio of seventy-two words; provided that no omission or delay in furnishing such copy of the depositions shall be deemed or construed to be any ground of appeal against the order of removal; provided also, that on the trial of any appeal against an order of removal, no such order shall be quashed or set aside either wholly or in part on the ground that such depositions do not furnish sufficient evidence to support, or that any matter therein contained or omitted raises an objection to the order or grounds of removal.

Of the application for the copy of depositions.

The application for the copy of depositions by the overseers or guardians must be to the clerk to the justices, and not to the overseers or guardians of the removing parish, which latter persons need take no notice of any such application, if made to them; and such application is not in itself a notice of appeal in order to bring the appellants within the necessary

(b) (1865), 34 L. J. M. C. 69.

time for serving such notice (*c*). The depositions, it seems, need not include evidence given before the justices against the making of the order (*d*). But 11 & 12 Vict. c. 31, s. 3, cited above, now modifies the result of any insufficiency or inaccuracy in the depositions. This provision relates solely to the protection of the pauper from the annoyance of being thrust out and back from parish to parish, and to the saving of expense, and has not any connection with the time within which it is practically possible to decide on appealing or submitting to the order. If the sessions began within the twenty-one days, it gave no authority to pass them over as impossible, but during the twenty-one days left the parties as they stood before, under 13 & 14 Car. 2, c. 12. And as the practice as to appealing was not altered by this Act, 11 & 12 Vict. c. 31, s. 9 (*post*, p. 658), was passed to supplement it (*e*).

The notice of chargeability should be complete in itself, and name the paupers chargeable, and should not do so by reference to another document (*f*); but the omission to name a child under the age of seven years in a notice of chargeability of the mother does not vitiate the notice or order (*g*). By 28 & 29 Vict. c. 79, ss. 2 and 3, guardians of unions have now the same power to apply for orders of removal as overseers, and to promote and defend appeals against such orders, but if the order is obtained by the overseers, the notice must be signed by a majority of them, and evidence is admissible to show whether those signing were or were not in fact a majority (*h*).

Notice of chargeability.

By overseers.

If the notice of chargeability and statement of grounds of removal be put in the post on one day, and received by the parish officers on the next, the latter is the day on which they are sent by post, and the application for the depositions is in time if received by the clerk to the parties on the twenty-first day thereafter (*i*); and the delivery on Sunday by post of the notice of chargeability is good as a delivery on the following day (*k*).

Of sending notice by the post.

By sect. 4 of the Union Chargeability Act, 1865 (*l*), every notice, statement, demand or other document required to be given by any such guardians (*i.e.*, of a union formed under the Poor Law Amendment Act, 1834), in respect of any order of removal, shall be deemed to be sufficiently authenticated if

Of notices given by guardians of a union.

(*c*) *R. v. St. Alkmund* (1863), 32 L. J. M. C. 99.

(*d*) *R. v. Holne* (1846), 15 L. J. M. C. 125.

(*e*) *R. v. Justices of Sussex* (1865), 34 L. J. M. C. 69.

(*f*) *R. v. Gomersal* (1848), 17 L. J. M. C. 163.

(*g*) *R. v. Stockton* (1845), 14 L. J. M. C. 128.

(*h*) *R. v. Surrey* (1844), 5 Q. B. 506; *R. v. Colerne* (1848), 17 L. J. M. C. 121.

(*i*) *R. v. Recorder of Richmond* (1858), 27 L. J. M. C. 197.

(*k*) *R. v. Leominster* (1862), 31 L. J. M. C. 95.

(*l*) 28 & 29 Vict. c. 79.

signed by their clerk in their name, and shall be deemed to be duly served upon the guardians to whom it shall be addressed if it be delivered to their clerk personally, or be left at his office, or be sent through the post, addressed to him at such office.

SECTION 2.

OF THE RIGHT OF APPEAL AGAINST AN ORDER OF REMOVAL, AND TO WHAT SESSIONS; AND HEREIN, OF THE NOTICE OF APPEAL; STATEMENT OF GROUNDS OF APPEAL, OF GROUNDS OF REMOVAL, AND OTHER MATTERS NECESSARY TO THE REGULAR EXERCISING OF THAT RIGHT.

Having already considered the law relating to appeals in general, we will now review the law more particularly applicable to appeals against orders of justices for removal of poor persons to their respective places of settlement.

Summary
Jurisdiction
Acts do not
apply.

By 11 & 12 Vict. c. 43, s. 35, orders for removal of any poor person chargeable to any parish are excepted from the provisions of the Summary Jurisdiction Acts, and the provisions of 42 & 43 Vict. c. 49, s. 31, as to notice of appeal do not apply to an appeal from an order of removal.

Enactments
conferring
appeal.

By 14 Car. 2, c. 12, s. 1, two justices are empowered by their warrant to remove parties to their last legal settlements. Provided (sect. 2), that all such persons who think themselves aggrieved by any such judgment of the said two justices, may appeal to the justices of peace of the said county, at their *next* quarter sessions.

Stat. 3 W. & M. c. 11, after establishing several kinds of settlement, enacts, by sect. 8, that if any person or persons shall find himself or themselves aggrieved by any determination which any justice or justices of the peace shall make in any of the cases aforesaid, the said person or persons shall have liberty to appeal to the next general quarter sessions of the peace to be held for the said county, riding or division, city or town corporate (*n*), who, on full hearing of the said appeal, shall have full power finally to determine the same (*o*).

Who may
appeal.

All persons aggrieved by an order of removal, viz., not only the parish officers of the parish to which the pauper is

(*n*) As to this see *post*.

(*o*) There never was any appeal against an order of justices for relief: *R. v. Justices of Devon* (1815), 4 M. & S. 421.

removed, but the pauper himself, may appeal against it (*p*); and guardians of a union, upon whom an order may be made under 28 & 29 Vict. c. 79, may also appeal (*q*), and as to guardians of other unions, see 30 & 31 Vict. c. 106, s. 24. In cases where the order has been suspended, and a subsequent order made for the payment of costs under 20*l.*, pursuant to 35 Geo. 3, c. 101, an appeal lies for the latter as a grievance to the parish, notwithstanding the death of the pauper previous to the removal; and this, though the grievance complained of did not exist till after 3 W. & M. c. 11, s. 9, gave an appeal to the party aggrieved (*r*).

Appeals against orders of removal were directed by 13 & 14 Car. 2, c. 12, s. 2, to be carried to the next quarter sessions of the county in which the orders were made, and by 8 & 9 Will. 3, c. 30, they were to be tried at the general or quarter sessions of the peace for the county, division, or riding wherein the parish, township, or place from whence such poor person shall be removed doth lie and not elsewhere. But since 11 & 12 Vict. c. 31, the appeal is to the next practicable quarter sessions after service of the order, and not after the removal itself.

In respect
of place.

Since the Municipal Corporations Act, 1835 (*s*), and now by the Municipal Corporations Act, 1882, s. 165, appeals against orders of removal from a parish within the borough, made by borough magistrates of a borough having a separate court of quarter sessions under that Act, must be brought to the borough quarter sessions, and not to the county sessions (*t*). So, where county justices have concurrent jurisdiction within such a borough with the justices of the borough, an appeal from an order of removal from a parish within the borough made by such justices must be to the borough sessions (*u*). The quarter sessions, and not the general sessions, is the proper tribunal to which to appeal (*x*).

A poor law union included a township situate in a county, and a parish situate in a borough, having a recorder and

(*p*) *R. v. Hartfield* (1692), Carthew, 222.

(*q*) Sect. 3.

(*r*) *R. v. St. Mary-le-Bow* (1810), 13 East, 51.

(*s*) 5 & 6 Will. 4, c. 76. In *R. v. Justices of Carmarthen* (1821), 4 B. & A. 291, a case before this Act on an order of removal made in a town, being a county of itself, where general sessions were held twice a year only, it was held the appeal should be to the next of such general sessions, but the words of the charter were very comprehensive.

(*t*) *R. v. St. Edmunds, Salisbury (Inh.)* (1841), 2 Q. B. 72; *R. v. Justices of Suffolk*, *R. v. Justices of Shropshire*, *R. v. Justices of Lancashire* (1841), 10 L. J. M. C. 138.

(*u*) *R. v. The Recorder of Liverpool* (1850), 15 Q. B. 1070.

(*x*) *R. v. Justices of Middlesex* (1843), 4 Q. B. 807.

separate quarter sessions; two justices of the borough, by virtue of sect. 27 of 30 & 31 Vict. c. 106, made an order removing a pauper residing in the township, and it was held that the appeal against the order was governed by and dependent upon the jurisdiction of the justices by whom the order was made, and that the appeal was to the borough sessions and not to the county sessions (*z*).

In respect
of time.

Every order of removal being an *ex parte* proceeding only, of which the parish to which the removal is to take place cannot know anything till it actually occurs (*a*), that parish must appeal to the next practicable sessions after they are "aggrieved." That grievance does not accrue from the date of the order, whatever it may be, and though a session has intervened; but from the service of notice of chargeability (*b*). In case of an order of suspension by reason of the sickness of the pauper, or any of his family, the time for appealing against such order shall be computed according to the rules which govern other like cases from the time of serving such order, and not from the time of making the removal, under and by virtue of the same (*c*). If after such suspension the pauper dies before actual removal made, the appeal is to the next practicable session after demand of the charges (*d*).

Time for
appealing.

Where the
order is
suspended.

Where an order of removal was suspended under 35 Geo. 3, c. 101, and no actual removal took place for five years, and two services of the order made in the interval were both bad, one being of a copy only without showing the original order, and the other being of a copy only, though authenticated by the justices who made the original, but on the actual removal a third and good service of the notice was made, it was held that the appeal was in time notwithstanding the above acts, though not entered till the next session after the removal (*e*). But in this case the question for decision was which, if any, of the three notices served was technically a good notice, the time at which such notice ought to have been served was not decided; but by a later case (*f*), where a removal was suspended for three years, and no notice of the order of removal was served, it was held that the order of removal was a nullity, notice not having been served within a reasonable time.

By 11 & 12 Vict. c. 31, s. 9, "no appeal shall be allowed

(*z*) *R. v. Justices of Staffordshire* (1872), L. R. 7 Q. B. 288.

(*a*) *Per Buller, J.*, in *Proser v. Hyde* (1786), 1 T. R. 414.

(*b*) *R. v. Recorder of Shrewsbury* (1853), 22 L. J. M. C. 98.

(*c*) 49 Geo. 3, c. 124, s. 2; see also *id.* ss. 1 and 3; 35 Geo. 3, c. 101, s. 2.

(*d*) *R. v. St. Mary-le-Bow* (1810), 13 East, 51.

(*e*) *R. v. Alnwick (Inh.)* (1821), 5 B. & A. 184.

(*f*) *R. v. Lampeter* (1824), 3 B. & C. 454.

against any order of removal, if notice of such appeal be not given, as required by law, within the space of twenty-one days after the notice of chargeability and statement of the grounds of removal shall have been sent, by the overseers or guardians of the removing parish to the overseers or guardians of the parish to which such order shall be directed, unless within such period of twenty-one days a copy of the deposition shall have been applied for, as aforesaid, by the last-mentioned overseers or guardians, in which case a further period of fourteen days after the sending of such copy shall be allowed for the giving of such notice of appeal; but in such case no poor person shall be removed under such order of removal until the expiration of such further period of fourteen days." This statute, and the 4 & 5 Will. 4, c. 76, s. 79, fix a maximum of delay after which the appeal is barred, but they have no reference to fixing any period of time after which the sessions next in fact may be passed over as next practicable, or after which the appellant may demand an adjournment, although the sessions think he has not used due diligence in giving notice of appeal and trial. It is a statute of limitations barring the appeal, of which no notice has been given in the limited time, but gives no right to the appellants to assume that it is not practically possible to prepare for trial of an appeal in less than twenty-one days, with an addition of fourteen days (*g*); but this case, although overruling previous decisions, must not be taken as requiring justices to dismiss an appeal under similar circumstances, they must exercise their discretion, and decide in each case whether the actual next sessions are next practicable sessions for the trial of the appeal (*h*).

Time for applying for copies of depositions.

Next practicable sessions.

The appellant derives no right to postpone preparing for trial under the 4 & 5 Will. 4, c. 76, s. 79, which prohibited the removal of the pauper until twenty-one days after the order had been served, with a further delay of the removal in case notice of appeal should be given till such appeal should be determined; nor under the 11 & 12 Vict. c. 31, by which no appeal is to be allowed, unless notice of appeal shall be served on the respondent within twenty-one days after the service of the order of removal, subject to a proviso for fourteen days in respect of depositions. The effect of these statutes is to bar all appeals of which notice is not given within the prescribed time, but does not affect the question of what are practicable sessions under 13 & 14 Car. 2, c. 12; and as it is practically possible to prepare for the trial of an appeal in less than thirty-five days after service of the order of removal, the sessions have a right to find that the appellants

(*g*) See *R. v. Justices of Sussex* (1865), 34 L. J. M. C. 69.

(*h*) *Id. v. Justices of Derbyshire* (1871), 35 J. P. 663.

have been guilty of unreasonable delay, and on that account to refuse an adjournment (*i*). The facts in *R. v. Justices of Sussex* were, that the order of removal was made on 18th August, and served on the appellants on 30th August. Appellants applied for a copy of depositions on 17th of September, and received them on the 19th September. On the 1st of October they gave notice of appeal for sessions held on 15th October for eastern division of county, and on 18th October for western division, eight days' notice of appeal necessary, but no grounds of appeal were delivered, and it was held that the sessions had a right to refuse to respite the appeal on the 15th of October. In *R. v. Skircoat* (*k*), notice of appeal was given sixteen days before the first sessions after the making an order of removal, and, on an *ex parte* motion of counsel, was respited as of course, and tried at the following sessions; it was held, that the court had power to try it then by reason of the previous entry and adjournment; but the court said that if the question had been put to them whether, in their opinion, the former sessions, in their discretion, ought to have adjourned the appeal, they should have answered in the negative, because the appellant had time to bring on the trial and no ground for the delay was assigned, and that entering and respiting should not be a matter of course, but in each case the court should exercise its judgment whether justice requires that the appeal should be adjourned.

The application for the copy of the depositions must be made to the clerk to the justices, and an application to the removing overseers is of no avail, and need not be taken any notice of by such overseers. Therefore, if such an application is made to the removing overseers, who take no notice of it, and twenty-one days after service of the order and statement are allowed to pass over without notice of appeal being given, the next sessions have no jurisdiction to enter and respite an appeal against the order of removal (*l*). Where it is disputed, the application for depositions must be proved strictly, and, in default of such evidence, the sessions may dismiss the appeal. The fact of the receipt of the copy of the depositions by the removing overseers is no evidence of the application (*m*). The twenty-one days are to be reckoned from the day on which the notice reaches the overseers (*n*). The statute does not require the statement of the grounds of appeal to be given within the prescribed time (*o*).

(*i*) *R. v. Justices of Sussex* (1865), 34 L. J. M. C. 69; *R. v. Justices of North Riding* (1789), 3 T. R. 150.

(*k*) *R. v. Skircoat* (1859), 28 L. J. M. C. 224.

(*l*) *R. v. St. Alkmund* (1863), 32 L. J. M. C. 99.

(*m*) *R. v. West Riding of Yorkshire* (1851), 2 L. M. & P. 651.

(*n*) *R. v. Recorder of Richmond* (1858), 27 L. J. M. C. 197.

(*o*) *R. v. Recorder of Derby* (1850), 20 L. J. M. C. 44.

The sessions, when asked to enter and respite an appeal, should not grant the application as a matter of course, and should exercise their judgment whether justice requires that the appeal should be adjourned; and if they find that the appellant has been guilty of unreasonable delay in not preparing for trial, they ought to refuse to respite (*p*).

Respiteing an appeal discretionary.

An appeal *may* be entered at an adjourned quarter session instead of the original session, if the practice of the sessions permits it (*q*); but the appellant is not bound to enter his appeal at such session, for the Acts take the holding of the sessions as the point of time to which they refer the appeal, and the sessions are always considered in law as one day, to whatever period they may, by accidental causes, be extended. The legislature never contemplated the continuance or adjournment of the sessions; and if appellants have not a reasonable time between the removal and the first day of the first sessions to consider whether they will appeal, they have till the following sessions to do so (*r*).

Entering appeal at adjourned session.

And lastly, it is important to observe, that the Act for amendment of the poor law (*s*) does not alter the existing practice of the courts of quarter sessions as to the time for giving notices of appeal against orders of removal. Thus it is not made necessary, by sect. 79, that notice of appeal shall be given within twenty-one days after the notice of removal thereby required, nor by sect. 81, that notice of appeal should be given fourteen days at least before the sessions (*t*).

Reasonable notice of appeal being required by the statute (*u*), the extreme time for giving it, in order to be effectual, is matter of regulation by each session. Their practice on the subject is to be ascertained at the office of their clerk of the peace. It must be remembered that the provisions of 12 & 13 Vict. c. 45 as to notice do not apply.

By 14 & 15 Vict. c. 105, s. 10, "it shall be lawful and

(*p*) *R. v. Justices of Sussex* (1865), 34 L. J. M. C. 69; *R. v. Skircoat* (1859), 28 L. J. M. C. 224.

(*q*) *R. v. Justices of Sussex* (1797), 7 T. R. 107; *Idem* (1865), *sup*.

(*r*) *R. v. Justices of Surrey* (1813), 1 M. & S. 479; see *ante*, pp. 458, 459.

(*s*) 4 & 5 Will. 4, c. 76.

(*t*) *R. v. Justices of Suffolk* (1835), 4 A. & E. 319.

(*u*) 9 Geo. 1, c. 7, s. 8, enacts, that "no appeal or appeals from any order or orders of removal of any poor person or poor persons whatsoever, from any parish or place to another, shall be proceeded upon in any court of quarter sessions, unless reasonable notice be given by the churchwardens or overseers of the poor of such parish or place, who shall make such appeal unto the churchwardens or overseers of the poor of such parish or place from which such poor person or persons shall be removed, the reasonableness of which notice shall be determined by the justices of the peace at the quarter sessions to which the appeal is made:—and if it shall appear to them that reasonable time of notice was not given, then they shall adjourn the said appeal to the next quarter sessions, and then and there finally hear and determine the same."

Notice of appeal may be sent by post.

sufficient to send any notice of appeal against an order of removal, or statement of grounds of appeal against such order, by post or otherwise, in like manner as a copy of an order of removal and statement of grounds of removal may now be sent by law." Under this statute, the notice of appeal must be supposed to be given at the time when, according to the regular and usual course of post, it ought to reach the respondents, although not, in fact, delivered until another day (*x*); but if in the course of post it would be delivered on a Sunday, it must be taken as delivered on the following day (*y*), and where it was delivered in the ordinary course of post on a Sunday, and if it had not been delivered until the Monday it would have been too late, it was held to be void (*z*).

Sufficiency of notice given by the guardians of a union.

Every notice, statement, demand, or other document required to be given by any guardians of any union formed under the 4 & 5 Will. 4, c. 76, in respect of any order of removal, shall be deemed to be sufficiently authenticated if signed by their clerk in their name, and shall be deemed to be duly served upon the guardians to whom it shall be addressed if it be delivered to their clerk personally, or be left at his office, or be sent through the post, addressed to him at such office (*a*); and by 30 & 31 Vict. c. 106, s. 24, when an order of removal is obtained by the guardians of any union not formed under the 4 & 5 Will. 4, c. 76, "such order shall be dealt with in all respects as provided by the Union Chargeability Act, 1865."

Time of serving notice of appeal in order to prevent actual removal.

If within the twenty-one days following the giving notice of the chargeability, and sending copies of the order of removal and grounds of removal, under 4 & 5 Will. 4, c. 76, s. 79 (*b*), no notice of appeal is given, and within such period no copy of the depositions shall have been applied for, the pauper may be actually removed; but in case a copy of the depositions be applied for, a further period of fourteen days after the sending of such copy shall be allowed, and no removal shall be allowed for such fourteen days (*c*).

Grounds of appeal against orders of removal—how to be stated

The grounds of the appeal must now be disclosed to the other side in writing, before coming to the sessions, and the inquiry there is limited to the grounds so stated, the words of the legislature being these (*d*): "In every case where notice

(*x*) *R. v. Slawstone* (1852), 21 L. J. M. C. 145.

(*y*) *R. v. Leominster* (1862), 31 L. J. M. C. 95.

(*z*) *In re Asprell v. Justices of Lancashire* (1852), 16 Jur. 1067; *R. v. Leominster*, *ubi sup.*; *R. v. Recorder of Richmond* (1858), 27 L. J. M. C. 197.

(*a*) 28 & 29 Vict. c. 79, s. 4; *R. v. Northwich Union* (1867), L. R. 2 Q. B. 383.

(*b*) *Ante*, p. 653.

(*c*) 11 & 12 Vict. c. 31, s. 9; see *ante*, p. 658.

(*d*) 4 & 5 Will. 4, c. 76, s. 81.

of appeal against such order shall be given, the overseers or guardians of the parish appealing against such order, or any three or more of such guardians, shall, with such notice *(e)*, or fourteen days at least *(f)* before the first day of the sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing, under their hands, of the grounds of such appeal; and it shall not be lawful for the overseers of such appellant parish to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid: provided always, that it shall not be lawful for the respondent or appellant parish, on the hearing of any appeal, to go into or give evidence of any other grounds of removal, or of appeal against any order of removal, than those set forth in such respective order, examination, or statement as aforesaid" *(h)*.

by appellants and delivered to respondents.

Where a statement of the grounds of appeal has been delivered in due time for the sessions, but the sessions, on the application of the appellant, have adjourned the appeal on the ground of the absence of a material witness, the applicants may, fourteen days before the next sessions, serve another statement containing fresh grounds of appeal, and the court are justified in quashing the order of removal on the evidence given on one of such fresh grounds *(i)*.

Delivery of fresh statement of grounds of appeal.

The clauses in 4 & 5 Will. 4, c. 76 *(k)*, directing the grounds of removal and appeal to be made known by each party to the other, are intended to compel such a disclosure by both as will enable them to go to the sessions fully aware of the questions which are to be there discussed *(l)*. To effectuate that intention the statement of the grounds of appeal must condescend to particulars, not to the extent of setting out the evidence by which facts are to be proved, but so as to give the opposite party reasonable means of inquiry *(m)*.

Particularity of statement.

As to the requisites of statements of grounds of appeal, first, it is held, that no defect of form or substance apparent on the face of an order of removal will be the subject of objection on the hearing of an appeal, unless stated as a ground of appeal *(n)*; and as to the written statements of the grounds of

(e) Nothing in this clause compels notice of appeal to be given fourteen days clear before the sessions, unless their practice requires it: *R. v. Justices of Suffolk* (1835), 4 A. & E. 319; *R. v. Justices of Sussex* (1865), 34 L. J. M. C. 69.

(f) Viz., fourteen clear days: see *ante*, p. 440.

(h) See *ante*, p. 446.

(i) *R. v. Kendal (Inh.)* (1859), 28 L. J. M. C. 110; see *R. v. Guardians of Cambridge Union* (1861), 30 L. J. M. C. 137; and see *ante*, p. 448.

(k) Sects. 79—81.

(l) See the recital to 12 & 13 Vict. c. 45, s. 3.

(m) See judgment of the court in *R. v. Justices of Derbyshire* (1837), 1 N. & P. at p. 710.

(n) *R. v. Witherwick* (1837), 6 A. & E. 273; see *R. v. Bromyard (Inh.)* (1828), 8 B. & C. 240.

removal, it is enough if they are sufficiently stated to enable the appellants to dispute the order and to make inquiries, but the sessions have been held to be right in rejecting evidence of a hiring and service in 1813, when the grounds of removal stated it to have taken place in 1810. And where a statement of a ground of appeal alleged that the pauper had gained a settlement by hiring and service in the appellant parish, it was held bad for not specifying the name of the party she lived with there, and the dates or times of the hiring and service by which she gained the settlement (*o*).

Of formal objections to grounds of removal and appeal.

But now formal objections to grounds of removal or grounds of appeal against the order are not to be allowed unless the party has been misled.

By 11 & 12 Vict. c. 31, s. 4, after reciting that a statement of the grounds of removal or of appeal is required to be communicated for the purpose of enabling the party receiving it to inquire into the subject of such statement, and, if need be, to prepare for trial, it is enacted, that upon the hearing of any appeal against an order of removal, no objection whatever on account of any defect in the form of setting forth any ground of removal or of appeal in any such statement shall be allowed, and no objection to the reception of legal evidence offered in support of a ground of removal or appeal alleged to be set forth in any such statement shall prevail, unless the court shall be of opinion that such alleged ground is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement, and to prepare for trial.

Amendment of statement of grounds of removal or appeal.

If the informalities in the statement of grounds of removal or appeal have misled the party, they are to be amended upon terms. By the proviso to the above section, in all cases where the court shall be of opinion that any such objection to such statement or to the reception of evidence ought to prevail, it shall be lawful for such court, if it shall so think fit, to cause any such statement of grounds of removal or appeal to be forthwith amended by some officer of the court, or otherwise, on such terms as to payment of costs to the other party, or postponing the trial to another day in the same sessions, or to the next subsequent sessions, or both payment of costs and postponement, as to such court shall appear just and reasonable. This proviso applies equally to orders of removal and orders of maintenance of a lunatic pauper (*p*).

Contents of statement.

A statement of the grounds of adjudication required to be sent under 16 & 17 Vict. c. 97, s. 107, which omitted to give the description and address of all the guardians by whom it was signed, has been properly amended by supplying the defect (*q*). The grounds of removal should state nature and

(*o*) *R. Justices of Derbyshire* (1837), 1 N. & P. 703.

(*p*) *R. v. St. Peter in Barton-on-Humber* (1851), 21 L. J. M. C. 23.

(*q*) *R. v. Guardians of Manchester* (1856), 26 L. J. M. C. 1.

kind of settlement relied on, but need not set out all the evidence in support, and evidence is admissible on the trial to support the order beyond what may have been given when the order was made. If a previous order, unappealed against, is relied on as an acknowledgment of the settlement, though it is doubtful whether this is a ground of removal, or more than evidence in support of the settlement relied on, it is better to state it. Still it would appear that the previous order, with proof of acquiescence, was admissible as evidence in support of a ground which stated that the appellant parish had given relief to the pauper when in the removing parish (*r*); and where one of the grounds of removal stated was, that the settlement had been acknowledged by payment of relief, and one of the grounds of appeal stated that such relief had been given in error and under a mistake, it has been held that the respondents were entitled to give evidence of a birth settlement of the pauper in the appellant parish, to rebut the case of mistake (*s*); and the powers of amendment conferred upon quarter sessions by 11 & 12 Vict. c. 31, extend to the addition of an entirely new ground; and it is competent to add as a ground a statement that such an order was made and served, and not appealed against (*t*).

The decision of the sessions, however, on all such points is final, and there is no power to state a case on such matters for the King's Bench Division (*u*); and see sect. 7 of 11 & 12 Vict. c. 31, *post*, p. 666.

Frivolous and vexatious statements, either of grounds of removal or of appeal, are guarded against by 11 & 12 Vict. c. 31, s. 5, which enacts that if either of the parties to the said appeal shall have included in the statement of grounds of removal or of appeal sent to the opposite party any ground or grounds of removal or appeal which shall, in the opinion of the court determining the appeal, be frivolous and vexatious, such party shall be liable, at the discretion of the said court, to pay the whole or any part of the costs incurred by the other party in disputing any such ground or grounds, such costs to be recovered in the same manner as any penalties or forfeitures are recoverable under 4 & 5 Will. 4, c. 76. These penalties are now recoverable under the Summary Jurisdiction Acts.

A general denial that the statements contained in the grounds of removal or depositions are untrue, is not necessarily a frivolous or vexatious ground of appeal (*x*).

Decisions of the sessions upon the sufficiency of order, grounds, &c., and upon amendments are final.

Frivolous and vexatious statements.

Decision of sessions as to sufficiency of

(*r*) *R. v. Rayton of the Eleven Towns* (1861), 30 L. J. M. C. 229.

(*s*) *R. v. Bucknell (Inh.)* (1854), 23 L. J. M. C. 129.

(*t*) *R. v. Llangenny (Inh.)* (1863), 32 L. J. M. C. 265.

(*u*) *R. v. Rayton of the Eleven Towns*, *sup.*; *R. v. Llangenny (Inh.)*, *sup.*

(*x*) *R. v. St Pancras* (1849), 19 L. J. M. C. 23.

grounds of
removal or
grounds of
appeal final.

By sect. 7 of 11 & 12 Vict. c. 31, "the decision of the court upon the hearing of any appeal against any order of removal, as well upon the sufficiency and effect of the statement of the grounds of removal and of appeal, and of the notice of chargeability, and of the copy or counterpart of the order of removal sent to the appellant parish, as upon the amending or refusing to amend the order of removal as aforesaid, or the statement of grounds of removal or appeal shall be final, and shall not be liable to be reviewed in any court by means of a writ of *certiorari* or mandamus, or otherwise" (*y*).

Notice of
appeal for
wrong ses-
sions.

Where notice of appeal was given to the county sessions where it ought to have been to the borough, and other notice of appeal was given within the twenty-one days, but the appellants went to the borough sessions, where their appeal was dismissed for want of notice to the borough sessions, it was held, that the statement that the appeal would be to the county sessions was mere surplusage, and was a good notice for the borough sessions, and a mandamus was granted to compel the recorder to hear the appeal (*z*); but where the appellants have acted upon their wrong notice, and gone to the wrong sessions, they cannot afterwards, on discovering their error, go to the proper sessions, and say that the notice was meant for the proper tribunal (*a*).

No appeal lies against an order of removal, unless and until notice of chargeability, and a statement of the grounds of removal, have been sent, because mere service of the order is not a grievance; and, therefore, the sessions have no jurisdiction to hear the appeal where the order only has been sent (*b*).

Though it is by no means essential that the statement of the grounds of appeal should accompany the notice of appeal, it is the more convenient practice. The grounds of appeal may, however, be served separately from, and before or after the notice of appeal, but in that case they must be served fourteen days at least before the sessions. If, on the other hand, the statement of the grounds of appeal accompanies a notice given before the fourteen days before the sessions, it will suffice though the latter be erroneous, if a good notice of appeal, incorporating such statement by reference, be afterwards served in proper time, according to the practice of the sessions, though within fourteen days before they begin (*c*), nor does anything in sect. 81 or sect. 79 of 4 & 5 Will. 4, c. 76, or in 11 & 12 Vict. c. 31, or 12 & 13 Vict. c. 45, alter

(*y*) See *R. v. Ruyton of the Eleven Towns* (1861), 30 L. J. M. C. 229.

(*z*) *R. v. The Recorder of Liverpool* (1850), 15 Q. B. 1070; *R. v. Justices of Bucks* (1854), 24 L. J. M. C. 15.

(*a*) *R. v. Justices of Salop* (1854), 24 L. J. M. C. 14.

(*b*) *R. v. Recorder of Shrewsbury* (1852), 22 L. J. M. C. 2.

(*c*) *R. v. Justices of Sussex* (1865), 34 L. J. M. C. 69.

the existing practice of sessions as to the time of giving notices of appeal against orders of removal, or compel them to be given fourteen clear days at least before the sessions (*d*).

The following form of notice of appeal and of grounds of appeal may be useful:—

Form of
notice of
appeal and
statement of
grounds of
appeal.

To the guardians of the poor of the ——— union, in the county [*or* counties] of ———.

Take notice, that the guardians of the poor of the ——— union, in the county [*or* counties] of ———, do intend at the next general quarter sessions of the peace, to be holden in or for the said county of ———, to (commence and) prosecute an appeal against an order of A. B., esquire, and C. D., esquire, two of his Majesty's justices of the peace in and for the said county of ———, bearing the date of ———, for and concerning the removal of J. P., and his wife Jane and their four children, to the ——— union aforesaid (which said appeal was duly entered and respited at the last general quarter sessions holden in and for the said county). And take notice that the following are the grounds of the said appeal:—

1. That the said order is bad and defective on the face thereof.
2. That the said pauper was not residing in your district at the time the said order was made.
3. That the said pauper was not legally chargeable to the common fund of your said union at the time the said order was made.
4. That the said pauper at the time the said order was made was not legally settled in any parish in the said ——— union.
5. That the said pauper resided in your said union for one year next before your application for the said order or warrant without relief.

And take notice that at the trial of the said appeal the guardians of the said ——— union mean to avail themselves of all or some one or more of the said grounds in support of the said appeal. Take notice also, that you are hereby required to produce at the trial of the said appeal the said pauper J. P., and also the said original order, together with this notice and these grounds of appeal. Witness my hand this ——— day of ———, 19—, in the name of the said guardians of the said ——— union.

_____,
Clerk to the said guardians.

Formerly the parish *from* which a removal took place was not placed by the legislature in the same situation as that *to* which it was made, as far as respects the statement in the examination and order of removal of the kind of settlement relied on. For such description might be less specific than

Statement of
settlement in
the deposi-
tions and
order of
removal.

that of the settlement relied on by the appellants in their statement of the grounds of appeal (e); but it is submitted that since the statute 11 & 12 Vict. c. 31, s. 2 of which provides that the notice required by 4 & 5 Will. 4, c. 76, shall be accompanied by a statement in writing setting forth the grounds of such removal, including the particulars of the settlement or settlements relied upon in support thereof, the principle laid down in *R. v. Kelvedon* cannot be applied.

SECTION 3.

OF THE DIFFERENT KINDS OF SETTLEMENT.

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Different kinds of settlement.

We are now to consider the leading points in the *Law of Settlements* which govern the decision of appeals against orders of removal; but the effect of the statutes by which the area of the parish is for practical purposes (*i.e.*, chargeability) enlarged to that of a union, and of those by which the status of irremovability is conferred by residence for a year in the same union, is to reduce the importance of this branch of sessions law, which will accordingly be treated of but briefly; and the reader is referred to the 15th edition of Archbold's *Poor Law* for a more ample treatise on the subject.

A settlement is either in the place of birth, which is the *primâ facie* settlement of every one till another is discovered to have been derived from one acquired by parents (called settlement by parentage), or, in the case of females, to have been acquired by marriage; or next, it may be acquired from inhabitaney connected with some circumstance giving it a character of permanency, as apprenticeship, hiring and service, renting a tenement, payment of public taxes of a parish (if *before* the passing of 35 Geo. 3, c. 101, or *since* the passing of 59 Geo. 3, c. 50; 6 Geo. 4, c. 57, and 1 Will. 4, c. 18) (g),

(e) Coleridge, J., in *R. v. Kelvedon (Inh.)* (1836), 1 N. & P. 138.
(g) See 4 Burn's J. by Chitty, 29th ed.; and 1 & 2 Will. 4, c. 42; and *post*.

serving an annual office, or by admission or acknowledgment, *e.g.*, by certificate of settlement in a parish named, relief, or previous order of removal unquestioned on appeal.

1. *Settlement by Parentage.*

The law on the subject has been simplified by the passing of the Divided Parishes Act (39 & 40 Vict. c. 61). By sect. 35 of that Act it is provided that "no person shall be deemed to have derived a settlement from any other person, whether by parentage, estate or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shown what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

The settlement to be retained by the child is the derivative settlement which it had the moment before the hour struck which made it sixteen (*h*), and it retains the derived settlement, but it is no longer subject to change with the parent's settlement, as it had been before the age of sixteen (*i*). But a child living with its father as part of his family, although over sixteen and having a derivative settlement from its father, and not having acquired a new settlement, is not removable (by virtue of sect. 1 of 11 & 12 Vict. c. 111) from a parish from which the father is irremovable (*i*).

If the father dies while the child is under sixteen, and the mother being a widow acquires a settlement in her own right before the child attains that age, or if the deceased father had no settlement, the child up to the age of sixteen takes the settlement of the widowed mother (*k*). But a settlement acquired by a second marriage is not a settlement acquired by the widow in her own right, and therefore the children of the first marriage under sixteen do not follow the settlement derived by the mother from her second husband (*l*).

The provisions of part 3 of sect. 35 have been held to have

(*h*) *Mitford Union v. Wayland Union* (1890), 25 Q. B. D. 164, *per* Lord Esher, M. R., at p. 169.

(*i*) *Ibid.*

(*k*) *Reigate Union v. Croydon Union* (1889), 14 A. C., *per* Lord Macnaghten, at p. 489.

(*l*) *Llanelly Union v. Neath Union*, [1893] 2 Q. B. 38.

no application to children under the age of sixteen so as to limit inquiry into the derivative settlement of the parent (*m*), and inquiry can be made into the derivative settlement of a parent of a child under the age of sixteen (*n*).

The meaning of sect. 35 is as far as possible to assimilate the position of illegitimate to that of legitimate children, and it was held that an illegitimate, like a legitimate, child could not gain a settlement for itself while under the age of sixteen (*o*); but this decision is not followed in the most recent case (*oo*), and it is now decided that there is nothing to prevent a child, legitimate or illegitimate, under the age of sixteen years from acquiring a settlement (*oo*).

In the case of an adult illegitimate pauper who had acquired no settlement of her own, neither had her mother, but it was proved that the father of the pauper's mother had a settlement, and that the pauper's mother derived that settlement from him, but no inquiries were made to show what the settlement was, it was held that the pauper must be deemed to be settled in the parish where she was born, and the court below was right not to inquire into the mother's derivative settlement (*p*).

Where a man had acquired no settlement of his own since he was sixteen years old, and left children chargeable to a parish, and his father's settlement was derivative, it was held by a Divisional Court that the children took the settlement of their father, and that as it could not be shown what settlement he derived from his father without inquiring into the derivative settlement of his father, the children's settlement was the parish in which they were born (*q*).

2. Settlement by Birth.

Legitimate Children.

Coleridge, J., in a case decided in 1849, says (*r*), "I take it to be a rule of law that every English-born subject has a settlement, and that settlement is *primâ facie* his place of birth. It is *primâ facie* only, because the moment it is shown that either the father or mother has gained a settlement in England then the settlement of the child is, as the case may be, that of the father or mother. But if they have no settlement here, or, what comes to the same thing, their place of settlement cannot be found out, then the child's birth settlement, which has always been potentially in existence,

(*m*) *Reigate Union v. Croydon Union* (1889), 14 A. C. 465.

(*n*) *West Derby Union v. Altham Union* (1889), 24 Q. B. D. 117.

(*o*) *Manchester Overseers v. Ormskirk Union* (1890), 24 Q. B. D. 678.

(*oo*) *West Ham Union v. Holbeach Union*, [1903] 2 K. B. 627.

(*p*) *Plymouth Union v. Axminster Union*, [1898] A. C. 586.

(*q*) *Bath Union v. Berwick-on-Tweed Union*, [1892] 1 Q. B. 731.

(*r*) *R. v. All Saints, Derby* (1849), 19 L. J. M. C. 15.

comes into practical effect." This dictum must now be read in conjunction with sect. 35 of 39 & 40 Vict. c. 61, *ante*, p. 669. And the mere gaining of a settlement by the father or mother is not now sufficient. Such settlement must be gained while the child is under the age of sixteen years and must be an original or primary settlement (*s*).

No birth settlement is acquired by children born under certain exceptional circumstances. These are:—

1. *Children born in Workhouses*.—54 Geo. 3, c. 170, s. 3, provides, that whensoever any person shall be born of the body of any poor person, in any house of industry, or house for the reception or care of the poor of any district, parish, township or hamlet, which shall be totally situated in any district, parish, township or hamlet contributing to the expenses of maintaining the poor in such house, or in any other district, parish, township or hamlet not contributing to such expense, such person shall, so far as regards the settlement of such person, be deemed and taken to be born in the district, parish, township or hamlet by whom the mother of such person was sent to, and on whose account the mother of such person was received and maintained in such house.

2. *Children born in Prisons or Lying-in Hospitals*.—Sect. 2 of 54 Geo. 3, c. 170, provides, that no person shall be deemed or taken to acquire any settlement in any district, parish, township or hamlet by reason of such person being born of the body of any mother actually confined as a prisoner within the walls of any prison, or any house licensed for the reception of pregnant women, in pursuance of an Act passed for the better regulation of lying-in hospitals and other places appropriated for the charitable reception of pregnant women, in which any such prison or house shall be situated.

Illegitimate Children.

Primâ fucie, the settlement of an illegitimate child under the age of sixteen is in the parish in which it was born, and the birth settlement is untouched until or unless a superior settlement is proved, so that it is on those who wish to prove a superior settlement to find out and establish it (*t*).

A birth settlement may be lost, however, if the parish in which the birth settlement has been gained is divided by Act of Parliament into two or more separate parishes, so that it ceases to exist as one parish. The birth settlement gained in the old parish ceases to exist also (*u*).

But the mere addition of a portion of another parish by an order of the Local Government Board made under the provisions of the Divided Parishes Act, 1876, and the Poor Law

(*s*) See *ante*, pp. 669, 670.

(*t*) *Headington Union v. Ipswich Union* (1890), 25 Q. B. D. 143.

(*u*) *Dorking Union v. St. Saviour's Union*, [1898] 1 Q. B. 594.

Act, 1879, to a parish in which a pauper had previously acquired a settlement does not operate to destroy the identity of the latter parish, and the settlement of the pauper remains unaffected (*v*).

A birth settlement does not require a residence of forty days to complete it (*x*).

3. Of Settlement by Marriage.

The following are the rules generally applicable to settlements by marriage:—

1. A woman marrying a man with a known settlement shall follow it, whether she lived at the place of it with him or not (*y*).

2. A wife cannot gain a new settlement for herself during coverture unless deserted by her husband, in which case she obtains a settlement under 24 & 25 Vict. c. 55, s. 3, and 39 & 40 Vict. c. 61, s. 34 (*z*). But without desertion no settlement is gained by a married woman in her own right under sect. 34 of 39 & 40 Vict. c. 61, by residence (*a*).

3. A woman marrying a man without a known settlement retains her maiden settlement (*b*), but she cannot be removed from her husband to her maiden settlement without his consent (*c*), but she may if he agrees (*d*) or if he is absent (*e*).

4. A widow upon her husband's death retains the settlement derived from him, and does not revert to her maiden settlement (*f*).

First, then, where the marriage is legal, the settlement of the husband shall, by the intermarriage, be immediately communicated to the wife; for wherever the husband is settled, there the wife must likewise be.

The case then arises, what is the husband's settlement? If derivative, it must be such a derivative settlement as is allowed by sect. 35 of 39 & 40 Vict. c. 61. In determining the settlement of a married woman, whose husband had never acquired a settlement of his own, but the birth settlement of the husband and the husband's father were known, it was held that the pauper's husband took his father's settlement, as not derivative, and that the pauper took the same settlement and not the birth settlement of her husband (*g*).

(*v*) *West Ham Union v. London County Council*, [1902] 1 K. B. 562.

(*x*) *R. v. Watford* (1846), 16 L. J. M. C. 1.

(*y*) *St. Giles's v. Eversley* (1723), 1 Stra. 580.

(*z*) *R. v. Maidstone Union* (1879), 5 Q. B. D. 31.

(*a*) *Medway Union v. Bedminster Union* (1889), 14 App. Cas. 465.

(*b*) *R. v. St. Botolph's, Bishopsgate* (1755), Burr. S. C. 367.

(*c*) *R. v. Carleton (Inh.)* (1775), Burr. S. C. 816.

(*d*) *R. v. Eltham* (1804), 5 East, 113.

(*e*) *R. v. St. Botolph's, Bishopsgate, sup.*

(*f*) *Reigate Union v. Croydon Union* (1889), 14 App. Cas. 465.

(*g*) *West Ham Union v. St. Giles-in-the-Fields* (1890), 25 Q. B. D. 272.

This being an admitted principle without exception, the only question it involves, which admits of being controverted on an appeal, is the legality of the marriage under which the settlement is claimed.

No settlement is gained by the woman from an invalid marriage, whether invalid under the Marriage Acts or from being within the degrees of consanguinity; so the woman gains no settlement where a man marries his deceased wife's sister, or the illegitimate daughter of such sister (*h*).

4. Of Settlement by Apprenticeship.

The settlement by apprenticeship derives its origin from stat. 3 & 4 W. & M. c. 11, s. 8, which enacts, that "if any person shall be bound an apprentice by indenture, and inhabit (*i*) in any town or parish, such binding and inhabitation (*k*) shall be adjudged a good settlement."

Apprenticeship appears to be the earliest mode recognized by law by which an adventitious or personal settlement could be acquired. It has been already observed that seven years is fixed as the limit of the age of nurture (*l*); and by an Act of Elizabeth (*m*), the children of the poor, on obtaining that age, might even be *compelled* to go into apprenticeship by the officers of the parish in which they are settled, though not resident in or a burden to it (*n*). However, this compulsory apprenticeship has been altogether put an end to (*o*), and since 3 & 4 Vict. c. 85, no child under the age of sixteen may be bound apprentice to a chimney sweeper, and every indenture of such apprenticeship is void; and before that time the age was ten, and prior to that eight, and in such cases also, the indenture contrary to the statutes was void, and no settlement could be gained under it (*p*). Neither can a settlement be gained where the indenture is so executed as to fraudulently evade the statute (*q*), or where there is a parol agreement only and no indenture is executed (*r*). No boy under the age of twelve, or girl of any age, can be bound to work in any mine underground (*s*). No *child* can be bound appren-

Who may not
be bound
apprentices.

(*h*) *R. v. Brighton* (1861), 30 L. J. M. C. 197.

(*i*) *I. e.*, for forty days.

(*k*) *R. v. Linkinhorne* (1832), 1 L. J. M. C. 42; *R. v. Burslem* (1839), 9 L. J. M. C. 1.

(*l*) See *Wangford v. Brandon* (1698), Carth. 449; 2 Salk. 482.

(*m*) 43 Eliz. c. 2, s. 5.

(*n*) *R. v. St. George, Exeter (Inh.)* (1835), 3 A. & E. 373.

(*o*) 7 & 8 Vict. c. 101, ss. 12, 13.

(*p*) *R. v. Hipswell* (1828), 8 B. & C. 466.

(*q*) *R. v. Barmston* (1838), 7 L. J. M. C. 31.

(*r*) *R. v. St. Margaret's, King's Lynn* (1826), 6 B. & C. 97.

(*s*) 35 & 36 Vict. c. 77; and 50 & 51 Vict. c. 58, s. 4.

tice by guardians till the age of nine (*t*), or twelve if he be apprenticed to the sea (*u*).

By an earlier Act of Elizabeth (*x*), the qualifications of persons entitled to take and to become apprentices had been regulated. The changes of time and the progress of commerce having made many of its provisions inconvenient, caused its penalties and restrictions to fall into a disuse, from which they were only occasionally revived for the purposes of vexation. They were therefore repealed (*y*); and all power specially given to justices over apprenticeships, contracted subject to the repealed Act of 5 Eliz. c. 4, is still reserved to the justices generally (*z*).

By 4 & 5 Will. 4, c. 76, s. 67, no settlement can be acquired by apprenticeship to the sea service, or to a householder exercising the trade of the seas as a fisherman or otherwise, or by any person who at the passing of that Act (*a*) was such an apprentice, in respect of such apprenticeship, unless he had served and resided forty days in the parish before the Act passed (*b*).

The contract itself, by which the relation of master and apprentice is formed; the residence under it, and the effects of that residence; its premature termination; and the questions of evidence which arise on the indenture, are discussed in detail in Archbold's Poor Law, 15th ed., but we will merely shortly refer to the leading points in respect of such indentures.

Contract of
binding.

1. The contract may be made by any person of more than seven years of age, for him or herself; for being invariably supposed to be for the child's benefit, it is a case beside the common rule of law, which makes the contracts of infants void; but the binding, to confer a settlement, must be such as would at the time be effectual for the purpose (*c*).

The other contracting party, the master, may also be an infant (*d*). It is perfectly immaterial what is the trade or occupation, if it be a contract of which the substantial object is to learn, and not to teach and serve (*e*), as, for instance, an articulated clerk to a lawyer (*f*).

2. Except in the case of *parish apprentices*, even if the

(*t*) 56 Geo. 3, c. 139, s. 7.

(*u*) 57 & 58 Vict. c. 60, s. 107.

(*x*) 5 Eliz. c. 4.

(*y*) 54 Geo. 3, c. 96.

(*z*) *Ibid.* s. 3.

(*a*) 14th August, 1834.

(*b*) *R. v. St. Giles's, Middlesex (Inh.)* (1843), 2 Q. B. 458.

(*c*) *R. v. Leeds (Inh.)* (1832), 4 B. & Ad. 248; *R. v. Queenborough (Inh.)* (1831), 2 B. & Ad. 219; *R. v. Manningtree* (1817), 6 M. & S. 214.

(*d*) *R. v. St. Petrox* (1791), 4 T. R. 196.

(*e*) *R. v. Edingale* (1830), 10 B. & C. 739; *R. v. Combe* (1828), 8 B. & C. 82; *R. v. Gwinnear* (1834), 1 Ad. & E. 152, in husbandry.

(*f*) *Parish of Clapham v. St. Pancras* (1860), 29 L. J. M. C. 141.

contract be not the sole act of the parties who are to stand in the relation of master and apprentice, it is absolutely necessary that they should both be *consenting* parties, in order to enable the apprentice to obtain a settlement by the service under the contract (*g*). The document must be executed by the apprentice if the apprenticeship is to be good and a settlement gained (*h*); but the signature of the master is not absolutely necessary, because his accepting the apprentice is sufficient proof of *his* consent (*i*).

3. The contract need not be by deed (*k*); a writing is sufficient to bind the apprentice and gain the settlement (*l*). And the contents of this document have given rise to many fine distinctions between a contract of apprenticeship and one of master and servant.

4. The indentures must be stamped with the proper stamps provided by statute (*m*). By the Stamp Act, 1870 (33 & 34 Vict. c. 97), the duty on an instrument of apprenticeship was 2*s.* 6*d.* where there was no premium, and if a premium then 5*s.* duty on every 5*l.* or fractional part of 5*l.* of such premium; but this Act is now repealed by the Stamp Act of 1891 (54 & 55 Vict. c. 39), which enacts that the duty on any deed of apprenticeship shall be 2*s.* 6*d.* irrespective of premium, and exempts any instrument relating to any poor child apprenticed, at the sole charge of any parish or township, or by any public charity, or pursuant to any Act for the regulation of parish apprentices.

Of the
contract of
binding.

5. By the Stamp Act of 1870, the full sum of money or consideration paid on binding the apprentice had to be fully set forth in the instrument of apprenticeship, otherwise the instrument was void. The Act of 1891 contains no such provision, and in instruments of apprenticeship entered into since that date the consideration need not now be set out. But in instruments previous to the Act of 1891 the full sum or consideration given must be set forth in words at length, and the duties paid on it (*n*).

But it has been determined, that where money was given by the grandfather of an apprentice to clothe him, *before* he entered upon his apprenticeship, this was not such a consideration as the statute then in force required to be set out in the indenture (*o*). Nor where the friends of the apprentice

(*g*) *St. Nicholas, Rochester v. St. Botolph Without, Bishopsgate* (1862), 31 L. J. M. C. 258.

(*h*) *R. v. Ripon* (1808), 9 East, 295.

(*i*) *R. v. St. Peter's-on-the-Hill* (1740), 2 Bott. 417.

(*k*) 31 Geo. 2, c. 11, s. 1.

(*l*) *Woodstock Union v. Shipston-on-Stour Union* (1892), 62 L. J. M. C. 43.

(*m*) *R. v. Edgeworth* (1789), 3 T. R. 353.

(*n*) *R. v. Bourton-on-Dunsmore* (1829), 9 B. & C. 872; *R. v. Baildon* (1832), 3 B. & Ad. 427.

(*o*) *R. v. Northowram* (1740), Burr. S. C. 145. The statute was 8 Anne, c. 9, s. 39.

covenanted to maintain and clothe him (*p*). Nor if the subject-matter of agreement for apprenticeship is not shown to be of 20*l.* value (*q*). And the enactment, that the full sum be inserted in the indenture, meant not less than the full sum: therefore if more were inserted, and the duty paid according to that, it was good (*r*).

The above are the principal points respecting the binding of apprentices on which settlements by apprenticeship are usually resisted, upon appeal to the quarter sessions. The apprenticeships of the poor exclusively fall under a different consideration, so far as respects the contract itself; and therefore are necessary to be noticed, before we proceed to consider the effects and consequence of contracts of apprenticeships generally.

Instruments of apprenticeship dated previous to 1844 are not within the scope of the present work.

Binding of
parish ap-
prentices in
unions.

By the Poor Law Amendment Act, 1844 (*t*), no poor child shall be bound apprentice by the overseers of any parish included in any union or subject to a board of guardians under the provisions of the Poor Law Amendment Act, 1834, but it shall be lawful for the guardians of such union or parish to bind any such poor child to be an apprentice, and in such case the indenture of apprenticeship shall be executed by the guardians, and shall not need to be allowed, assented to, or executed by any justice or justices of the peace; and under the same section the Local Government Board had power to make orders dealing with the apprenticeship of pauper children. Such orders were consolidated, and are known as the Consolidated Order of the 24th July, 1847. The reader is referred to such order for fuller particulars of the age of the apprentice to be bound, his consent, the duration of the apprenticeship, qualifications of master, &c.

Apprentice
need not sleep
in the master's
parish.

The settlement of an apprentice does not necessarily depend on the settlement of the master or mistress, but on his own binding and inhabitation for forty days, during his apprenticeship, in the actual service of such master or mistress, though not within the compass of any one year (*u*); and where an apprentice slept at his parent's house for forty days to be cured of an illness he gained a settlement there (*v*); and the like where he slept and worked in a different parish from the master, but the latter maintains him (*x*).

(*p*) *R. v. Portsea* (1776), Burr. S. C. 834; see *R. v. Aylesbury* (1832), 3 B. & Ad. 569.

(*q*) *R. v. Enderby* (1831), 2 B. & Ad. 205; *R. v. Aylesbury*, *sup.*; 2 Chit. Stat. 936, n.

(*r*) *R. v. Keynsham* (1804), 5 East, 309.

(*t*) 7 & 8 Vict. c. 101, s. 12.

(*u*) *R. v. Aldstone* (1831), 2 B. & Ad. 207.

(*v*) *R. v. Stratford-upon-Avon* (1809), 11 East, 176; *R. v. Somerby* (1838), 9 A. & E. 310.

(*x*) *R. v. Banbury* (1833), 5 B. & Ad. 176.

But the residence must be in the service of the master; for the words of the statute creating this species of settlement (*y*), “*binding and habitation*,” must be understood of a habitation referable in some way to the apprenticeship (*z*), viz., in the character of an apprentice, and in some way or other in furtherance of the object of the apprenticeship, and not a mere matter of indulgence (*a*).

Must be in the service of the master.

If an apprentice, on account of illness, go into another parish than that in which his master lives, merely as a temporary residence to get cured, without performing any sort of service for his master during such residence, a settlement is not gained there by such temporary residence in such other parish (*b*), and the like where he sleeps away on Saturdays and Sundays with his master's consent (*c*). And a mere residence by indulgence is not sufficient to confer a settlement in a parish where no service is performed (*d*).

Residence on account of illness or indulgence confers no settlement.

On the other hand, if, during the residence in a parish different from that of the master, the apprentice performs service for his master there, his residence is then considered referable to, and connected with, the apprenticeship, and he gains a settlement in the parish where he resides (*e*). Where an apprentice has inhabited forty days in more parishes than one, he gains a settlement in that parish where he sleeps on the last night of his apprenticeship, and in pursuance of the apprenticeship (*f*).

Forty days is, in *all* cases, the time of residence necessary for gaining a settlement by apprenticeship; which arises by inference from the statute making settlements depend on residence (*g*); as by a subsequent statute (*h*), apprentices, bound by indenture, and inhabiting in a parish (under such apprenticeship), are excepted out of the provision for removal contained in that Act (*i*). The forty days' “inhabitation” within a parish need not be all at one time, or in one year (*k*).

An indenture of apprenticeship may be assigned from master to master, through any number successively; and if the

Assignment of indentures of apprenticeship.

(*y*) 3 & 4 Will. & M. c. 11, *ante*, p. 673.

(*z*) *R. v. Barmby (Inh.)* (1806), 7 East, 381; *R. v. Linkinhorne* (1832), 1 L. J. M. C. 42; *R. v. Burstlem (Inh.)* (1839), 11 A. & E. 52; and Lord Tenterden's judgment in *R. v. Dremerchion* (1832), 3 B. & Ad. 420.

(*a*) *Per* Lord Tenterden, *R. v. Ilkeston* (1825), 4 B. & C. 64.

(*b*) *R. v. Barmby (Inh.)*, *sup.*

(*c*) *R. v. Ribchester* (1813), 2 M. & S. 135.

(*d*) *R. v. Ilkeston*, *sup.*; *R. v. St. Mary, Bredin* (1819), 2 B. & A. 382.

(*e*) *R. v. Somerby (Inh.)* (1838), 9 A. & E. 310. So though the apprentice was illegally employed by his master.

(*f*) *R. v. Ilkeston*, *sup.*; *R. v. Barton-upon-Irwell* (1863), 32 L. J. M. C. 102.

(*g*) 13 & 14 Car. 2, c. 12.

(*h*) 3 Will. & M. c. 11, s. 8, referring to sect. 3; *ante*, p. 673.

(*i*) *R. v. Gwinncar* (1834), 1 A. & E. 152.

(*k*) *R. v. Aldstone* (1831), 2 B. & Ad. 207.

original contract was valid, and the assignments were regularly made by each master in succession, the residences under them will, for the purposes of settlement, be governed by the same rules as if the apprentice had continued in his first place of abode under the indenture.

But though the assignment may be by parol, it must be expressly made before the indentures are parted with, and be for a service with a particular person, not a general leave or licence, to serve *any one*, at the discretion of the apprentice: for such permission and service will not amount to an assignment, and therefore cannot enable the party to obtain a settlement (*l*).

The true question in all such cases is, whether the service to the second master is a constructive service to the first master under the indenture, as between him and the apprentice: to the solution of which it is wholly immaterial whether the second master knew of the apprenticeship or not (*m*); though such ignorance furnishes strong evidence that the second service was unconnected with any such contract (*n*).

As has been observed, the assignment may be by parol; but if it be by deed, the deed is governed by the same rules of evidence, when offered in proof, as the original indenture; *i.e.*, it must be stamped, and having been reduced to writing, must be produced, and cannot be proved by parol testimony (*o*), except by way of secondary evidence according to the ordinary rules of proof.

If the assignment of a person, not a *parish* apprentice, is by deed or indorsement on the indenture, it must be stamped as an assignment; and if the parish officers of an appellant parish are sworn to have the custody of such a document, they will not be compelled to produce it at the instance of the respondents, in order that by having it stamped it might be made evidence for the latter, on the hearing of an appeal (*p*).

Assignment of
parish ap-
prentices.

The consent of two justices is essential to the valid placing out or assignment by a master of his parish apprentice (*q*). Nor since 1st October, 1816, can any settlement be gained by service and inhabitation under such transfer, unless performed under sanction of such consent. So that where an apprentice served a second master without assent of the original one to

(*l*) *R. v. Maidstone (Inh.)* (1836), 5 A. & E. 327; *R. v. Holy Trinity* (1790), 3 T. R. 605; *R. v. Shebbear* (1800), 1 East. 73; *R. v. Hindringham* (1796), 6 T. R. 557.

(*m*) *Per* Lord Denman, C. J., in delivering the judgment of the court in *R. v. Sandhurst* (1837), 6 A. & E. 142, where all the cases on the subject are reviewed.

(*n*) *Ibid.*; and see *R. v. Banbury* (1833), 5 B. & Ad. 176; and *R. v. Maidstone, sup.*

(*o*) *R. v. St. Paul, Bedford* (1795), 6 T. R. 452.

(*p*) *R. v. Churchwardens, &c. of Westoe* (1836), 5 A. & E. 786.

(*q*) 56 Geo. 3, c. 139, s. 9.

that particular service till 1st October, 1816, the subsequent ratification of that service by the first master, without assent of justices, was held not to render the previous service valid so as to confer a settlement (*r*).

The interest of a master in his apprentice is a mere personal interest determined by the death of either. Thus, a master's executors cannot claim the latter's services, though if the master has covenanted to maintain him for the term, they are bound at common law to perform that covenant(s). However, with respect to parish apprentices, with whom nothing or no more than 5*l.* was paid, provision has been made that no covenant for maintenance shall continue for more than three calendar months after the death of the master, during which time the apprentice is to live with, and serve as an apprentice, his master's personal representative, or such person as he shall appoint (*t*). Within those three months any two justices of the peace where the master died, on application by the widow of the master, husband of the mistress, son, daughter, brother, sister, or personal representative of the deceased, may, by indorsement on the indenture, order the apprentice to serve as such, any one of such persons so applying (such person having lived with, and been part of the family of such master, &c., at the time of his death) (*u*); and the apprentice being such an one only as lived with and made part of the family, or was in the actual employment of the original master, or any subsequent master appointed under the Act at the time of their deaths respectively (*x*), and it was held that an apprentice, who was not living at the time of his mistress's death with her appointee under the provisions of the Act, though living with her son by her individual consent, could not gain a settlement in another parish by serving another mistress with the consent of the son and assignee of the original mistress, given after the death of the original mistress. The contract of service is at an end upon the death of the original mistress, unless continued in the manner prescribed in the Act (*y*).

Premature termination of the relation created by the indenture, as by death, bankruptcy, agreement to cancel indentures, &c.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 41), upon the bankruptcy of the master, either apprentice or master can claim a full discharge from the articles of apprenticeship.

Bankruptcy of master and discharge of indentures.

An agreement to cancel the indenture, in consideration of a sum of money to be paid by the apprentice at a future time, and an abandonment of the master by the apprentice, in con-

Cancellation of indenture.

(*r*) *R. v. Maidstone (Inh.)* (1836), 5 A. & E. 326.

(*s*) *R. v. Peck* (1698), 1 Salk. 66.

(*t*) 32 Geo. 3, c. 57, s. 1.

(*u*) *Ibid.* s. 2.

(*x*) 32 Geo. 3, c. 57, s. 5.

(*y*) *R. v. Sheephead* (1812), 15 East, 59.

sequence of such agreement, does not avoid it (*z*); nor even a voluntary entering into the king's service, the master not prohibiting it, but not giving up the indenture (*a*). But on the master's bankruptcy the infant apprentice may consent to the cancellation, as it is obviously for his benefit (*b*).

Discharging
parish
apprentices.

Parish apprentices, with whom less than 5*l.* has been given, may be discharged by two justices from any master who is so far reduced in circumstances as to be unable to keep or employ them (*c*).

Termination
of contract
by consent.

An indenture of a parish apprentice may be put an end to by consent of all parties; that is to say, the master, the apprentice, and the parish officers, consenting; but not otherwise, while the apprentice is a minor. Also by the master and the apprentice only, the latter being of full age, but not otherwise (*d*); for, though an apprentice under age may bind himself, being a contract necessarily for his advantage, and a case excepted out of the general rule of law respecting infants, the consent of an infant alone to his *discharge*, is, "no consent at all" (*e*). And, therefore, where an infant apprentice, who had bound himself for seven years, and served three of them, acquiesced in his master's proposal to buy the remainder of his time for *sixpence*, paid the sixpence, and then bound himself to another master, it was held that the first contract was not dissolved, and that the second was, consequently, invalid, and no settlement could be gained under it (*f*).

Evidence of
the indenture.

The sessions can only receive secondary evidence of an apprenticeship after it has been shown that the indentures are destroyed, or cannot be found or produced (*g*). And if the opposite party produce an indenture, or notice given to them for that purpose, it can only be read by the party at whose instance it is produced on giving the usual proof of the execution (*h*); but if the deed is in the possession of the opposite party and proper notice to produce has been given, then upon non-production and proof having been given that the deed is in the possession of the opposite party, secondary evidence of the deed is admissible.

It is a question to be decided by the court of quarter sessions whether the search has been sufficient or not (*i*), but

(*z*) *R. v. Chipping Warden* (1799), 8 T. R. 108.

(*a*) *R. v. Hindringham* (1796), 6 T. R. 557.

(*b*) *R. v. Mountsorrel* (1815), 3 M. & S. 497.

(*c*) 32 Geo. 3, c. 57, s. 8.

(*d*) *R. v. Sandford* (1786), 2 Bott, pl. 572; *R. v. Austrey* (1758), Burr. S. C. 441.

(*e*) *R. v. Ecclesal Bierlow* (1766), Burr. S. C. 562.

(*f*) *R. v. Great Wigston* (1824), 3 B. & C. 484; see *R. v. Gwinnear* (1834), 1 A. & E. 152.

(*g*) *R. v. Denio (Ink.)* (1827), 7 B. & C. 620.

(*h*) *Gordon v. Secretan* (1807), 8 East, 548; *Carlisle v. Eady* (1824), 1 C. & P. 234.

(*i*) *M'Cahey v. Alston* (1836), 2 M. & W. at p. 214.

it is a mixed question of law and fact, which can be reviewed, whether there was reasonable evidence to satisfy the sessions that the document was lost (*k*). In that case, to prove a settlement by apprenticeship in a parish, a document purporting to be an indenture of apprenticeship, by which the apprentice had been bound by parish officers of another parish to serve the master in the parish of alleged settlement, was produced from the parish chest of the binding officers' parish. The document was signed and sealed by the master, but not by the parish officers. Proof of search among the papers of the apprentice which he left at his decease was given. No indenture could be found, and the court considered it more probable that the indenture would be kept by the apprentice at the expiration of the service than by the master; it was held that sufficient search had been made and secondary evidence could be admitted, although no search among the master's papers was proved.

The sessions are bound to admit evidence offered to show that the contract was not one of apprenticeship, but for immoral or fraudulent purposes (*l*).

5. Settlement by Residence.

By the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61, s. 34), it is enacted that where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or court shall think sufficient.

The statute is not retrospective, and a person who had resided in a parish for three years, but whose residence therein had ended before the passing of the Act, did not acquire a settlement therein under the section (*m*); but residence for the required period, during part of which the pauper is under the age of sixteen, is good ground for a settlement (*n*). "Parish," however, in the above section does not include "union," and residence for more than two years in one parish

(*k*) *R. v. Hineckley (Inh.)* (1863), 32 L. J. M. C. 158.

(*l*) *R. v. North Wingfield (Inh.)* (1831), 1 B. & Ad. 912; *R. v. Barmston* (1838), 7 A. & E. 858.

(*m*) *R. v. Guardians of Ipswich* (1877), 2 Q. B. D. 269.

(*n*) *Highbury and Swindon Union v. Westbury-on-Severn Union* (1889), 14 App. Cas. 465.

of a union and for more than one year in another parish of the same union does not constitute a settlement(*o*); and where a wife takes lodging during her husband's absence, in the absence of evidence that the lodgings were taken by the husband's directions, the husband could not be treated as constructively resident there, and the period after his wife's removal and before his return cannot be treated as part of the necessary three years' residence(*p*).

The residence must be continuous, and under such conditions in each of such years as would have created a status of irremovability; parish relief during any part of the three years, therefore, disqualifies the pauper from gaining a settlement(*q*), but otherwise if the three years are completed and the other conditions fulfilled before the receipt of the relief(*r*).

A wife living with her husband has not capacity to acquire by residence a settlement; her status and settlement follow and change with her husband's(*s*); but when deserted by her husband she can acquire a settlement under this section(*t*).

A mere succession of visits will not gain a settlement; the word "reside" imports that the man is in the place as his residence(*u*).

6. Of Settlement by Renting a Tenement.

Of settlement
by renting a
tenement.

The acquisition of a settlement by this means has been greatly narrowed. It originally grew out of the first section of 13 & 14 Car. 2, c. 12, which confined the power of parish officers to remove poor, resident in their parishes, to the cases of persons "coming to settle in any tenement under the yearly value of 10*l*."; so that a certificated person, residing for forty days in a parish while holding in his own right a tenement there of at least 10*l*. annual value, being irremovable, might thereby acquire a settlement of this kind. The comprehensive terms of the above Act led to such extensive claims under it, and opened so wide a field of litigation in consequence, that in 1819 they were much contracted by 59 Geo. 3, c. 50, which came into operation on 2nd July in that year. That Act, after giving rise to some very nice distinctions, was repealed on 22nd June, 1825, and replaced by statute 6 Geo. 4, c. 57, which having omitted to retain one of the strict conditions imposed by 59 Geo. 3, c. 50, was rendered more stringent

(*o*) *Plomesgate Union v. West Ham Union* (1881), 6 Q. B. D. 576.

(*p*) *West Ham v. Cardiff Union*, [1895] 1 Q. B. 766.

(*q*) *Dorchester Union v. Weymouth Union* (1885), 16 Q. B. D. 31.

(*r*) *R. v. Brompton Union* (1878), 3 Q. B. D. 479.

(*s*) *Medway Union v. Westminster Union* (1889), 14 App. Cas. 466.

(*t*) *R. v. Maidstone Union* (1879), 5 Q. B. D. 31.

(*u*) *R. v. Stepney Union* (1884), 54 L. J. M. C. 12.

by 1 Will. 4, c. 18; and was again altered by 4 & 5 Will. 4, c. 76, s. 66. Inasmuch as any questions can now hardly arise on rentings of tenements before 30th March, 1831, the law respecting the earlier Acts is here omitted. Rentings before 1831.

By 1 Will. 4, c. 18, s. 1 (which passed 30th March, 1831, and was prospective only), after reciting 6 Geo. 4, c. 57, it is stated, "and whereas doubts had arisen with respect to the intention of the legislature concerning the occupation of such house, building, or land (viz., those mentioned in 6 Geo. 4, c. 57), by the person hiring the same, and concerning the amount of the rent to be paid and the person paying the same; and whereas it is expedient that such doubts should be removed," and it is enacted, that from and after the passing of the Act (viz., 30th March, 1831), no person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of such yearly hiring of a dwelling-house or building, or of land, or of both, as in the said Act (6 Geo. 4, c. 57) expressed, unless such house, or building, or land shall be actually occupied under such yearly hiring, in the same parish or township, by the person hiring the same, for the term of one whole year at the least, and unless the rent for the same, to the amount of 10*l.* at the least, shall be paid by the person hiring the same. Law of renting tenement since 30th March, 1831, viz., under statutes 1 Will. 4, c. 18, s. 1, and 4 & 5 Will. 4, c. 76, s. 66.

And by 4 & 5 Will. 4, c. 76, s. 66, from and after 14th August, 1834, "no settlement shall be acquired or completed by occupying a tenement unless the person occupying the same shall have been assessed (*x*) to the poor's rate, and shall have paid the same in respect of such tenement for one year" (*y*). Payment of poor's rates for a year requisite.

A farm was occupied under a joint letting to the pauper and his father, and in the rate books of the parish the surname common to both appeared as the occupier in respect of two rates, and in respect of a third the name of the father appeared. The father had paid all these rates, and the sessions having found as a fact that the pauper was assessed to the poor rate, it was held that there was evidence to support that finding, and that the payment by the father under the circumstances of the joint tenancy was a sufficient payment by the son (*z*); but the payment by a third person must be authorized (*a*), or no settlement is gained. And where a landlord was assessed to a poor rate under a local Act render-

(*x*) An occupier of a dwelling-house who pays is "assessed," though his name is not in the poor's rate as occupier: *R. v. Hulme (Inh.)* (1843), 12 L. J. M. C. 100; see *R. v. St. Olave, Southwark (Inh.)* (1844), 13 L. J. M. C. 161.

(*y*) See sect. 68 of this Act, *post*, p. 697, which extinguishes any settlement gained by the possession of any estate or interest in the parish upon ceasing to inhabit within ten miles thereof.

(*z*) *R. v. Huthwaite* (1852), 21 L. J. M. C. 189.

(*a*) *R. v. Bengeworth (Inh.)* (1854), 23 L. J. M. C. 124.

ing it obligatory on the parish officers to rate the landlord, but the tenant having claimed to be rated under the Reform Act (2 Will. 4, c. 45, s. 30), his name was accordingly inserted together with that of his landlord in the rate, and he paid the rate, it was held sufficient (*b*).

The three Acts, 59 Geo. 3, 6 Geo. 4, and 1 Will. 4, require the same residence of forty days, and the same hiring and renting for a year of a tenement of the same nature and description.

What occupation of the tenement is requisite since 1 Will. 4, c. 18, passed 30th March, 1831.

To obtain this settlement in respect of a "*dwelling-house or building*," it must be "separate and distinct" within the decisions on these words in 6 Geo. 4, c. 57, and 59 Geo. 3, c. 50; and the hirer must actually occupy for the year the *whole* of the house or building which he rents (*c*). And where two dwelling-houses are included in one demise at one rent, no settlement is gained if the occupier sub-lets one cottage and lives in the other, although the latter is worth more than 10*l.* a year rent (*d*). In computing the "one whole year at the least," within 1 Will. 4, c. 18, s. 1, a fraction of a day counts as a day, so that a tenancy and occupancy for one whole year, commencing on the 30th of September, is complete if the tenant enters at noon of 30th of September of one year and quits at four in the afternoon of the 29th of September of the next year (*e*).

Separate and distinct dwelling-house.

A ground floor, but with a passage and doors open to and in common with the occupier of the first floor, is not a separate and distinct dwelling-house (*f*). For, if he underlets any portion of it, however small, at however low a rent, for any time, however short, so as by such underletting to confer on another the right to exclusive occupation of that part which is occupied accordingly by the lodger, the hirer of the house has not the "*actual*" occupation of the whole house as required by 1 Will. 4, c. 18, and cannot, therefore, obtain this settlement (*g*).

But an innkeeper, by merely taking an inmate, does not exclude himself from a settlement, for the guest's occupation is his (*h*); and the like is held in the case of a householder letting beds or half beds by the night or week (*i*), where he has access to and control over the whole house, keeping the keys of all the rooms, and conferring on his lodgers no other right than to the use of their beds by night.

(*b*) *R. v. St. Giles-in-the-Fields* (1857), 26 L. J. M. C. 55.

(*c*) See *per* Patteson, J., in *R. v. Great Usworth* (1836), 5 A. & E. 263.

(*d*) *R. v. Berkswell* (1837), 6 A. & E. 282.

(*e*) *R. v. St. Mary, Warwick (Inh.)* (1853), 22 L. J. M. C. 109.

(*f*) *R. v. Elswick* (1860), 30 L. J. M. C. 66.

(*g*) *R. v. St. Nicholas, Rochester* (1834), 5 B. & Ad. 219; *R. v. St. Nicholas, Colchester* (1835), 2 A. & E. 599.

(*h*) *R. v. St. Nicholas, Colchester, sup.*, *per* Denman, C. J., at p. 604.

(*i*) *R. v. St. Giles-in-the-Fields* (1836), 4 A. & E. 495.

So it seems that a party hiring since 30th March, 1831, must pay the rent out of his own funds, and have the exclusive occupation by right for the year, and cannot, by remaining in occupation after an assignment to a trustee of his farming effects to be worked for the benefit of his creditors, obtain a settlement, as he had neither paid the rent nor had an undivided occupation for the year (*k*).

The minister of a Wesleyan congregation does not gain a settlement by paying the rent and the rates and taxes of a house occupied by him within his circuit for a year, in accordance with the practice of the Wesleyan congregation, by which the circuit stewards repay him the amount so paid (*l*).

It has been held under this Act that no settlement is gained by occupying the same tenement for a continuous year, the occupation during part of that year being under one hiring for a year, and during the remainder under another similar hiring (*m*). If a tenant from year to year lets from year to year, and then gives up his own interest to the landlord paramount by verbal agreement, and the tenant in possession afterwards verbally agrees with the landlord to become his tenant from year to year, such last agreement is a new hiring, and puts an end to the former hiring as under-tenant (*n*).

An agreement to take a cottage "for three months," at a yearly rent of 18*l.*, the first monthly payment to be made on 25th January, with three months' notice to quit from either party, and occupation for eighteen months, with payment of some of the rates, was held to confer a settlement (*o*). Renting and going into possession of three acres of land in order to sink a coal pit, at a yearly rent of 135*l.* an acre for the coal, and 50*s.* an acre for the surface, from June, 1844, the rent not to commence till after the coal was reached, and the coal was reached in December, 1844, and in June, 1845, half-year's rent for coal paid, and a year's rent for surface; in September pit fell in and land was given up. From June, 1844, to September, 1845, a cottage was also rented at 5*l.* 10*s.* a year, and occupied and rent paid; held not sufficient, as tenements to the value of 10*l.* a year were not rented and occupied (*p*).

(*k*) *R. v. Pakefield* (1836), 4 A. & E. 612; *R. v. Melsonby (Inh.)* (1840), 12 A. & E. 687.

(*l*) *R. v. Churchwardens of Tiverton* (1861), 30 L. J. M. C. 79.

(*m*) *R. v. Banbury (Inh.)* (1834), 1 A. & E. 136.

(*n*) *Ibid.*

(*o*) *R. v. Churchwardens of Willesden* (1863), 32 L. J. M. C. 109; see also *R. v. St. Giles, Cripplegate* (1863), 33 L. J. M. C. 3.

(*p*) *R. v. West Ardsley (Inh.)* (1863), 32 L. J. M. C. 255.

7. Of Settlement by Payment of Parochial Taxes.

The reason why payment of parochial taxes confers a settlement is, that a parish, by rating a man, admits that he is a parishioner(*q*). The history of this settlement is curiously diversified. Long and often on the verge of extinction, it has always been revived by the unforeseen result of the various Acts intended to destroy it. It originated in 1691, with the enactment(*r*), that if any person who shall come to inhabit in any parish, shall be charged with and pay his share towards the public taxes or levies of the parish, he shall be adjudged and deemed to have a legal settlement. Under this Act a settlement was acquired by forty days' residence on a tenement of whatever yearly value, after being rated to any parochial tax, as the land-tax, or the poor or church rate(*s*). But when this kind of settlement was at length limited to payments of parochial rates in respect of tenements of the yearly value of 10*l.*, removals on this ground fell into disuse, and the settlement became in a degree confounded with that obtained by renting a tenement, the same condition precedent being required in both cases(*t*). However, as soon as 59 Geo. 3, c. 50, imposed special restrictions on the right of obtaining a settlement by renting a tenement, the settlement by paying parochial rates or levies was again noticed and resorted to; for it often happened that a party had paid one or more of the "public taxes or levies" (*i.e.*, the taxes raised within the parish(*u*)) in respect of a tenement of the yearly value of 10*l.*, as pointed out by 35 Geo. 3, c. 101, s. 4, though he had neither hired, nor held, nor paid rent for a year, as required by 59 Geo. 3, c. 50; and, in such a case, though he gained no settlement by renting the tenement, he would still acquire one by having contributed to the parochial burdens. The result of this unforeseen circumstance was, that an act which had been passed to shut one avenue of litigation, opened another scarcely less fruitful. Nor has the Act of 22nd June, 1825(*x*), by which the settlement by paying parochial rates for any tenement "not being the party's own property" is expressly narrowed to the same conditions as that by which the settlement in respect of renting a tenement may be acquired under that Act, prevented new cases of establishing this settlement in a manner which bears a strong resemblance to the result of 59 Geo. 3, just above mentioned. For, in a

(*q*) *R. v. Llangammarch (Inh.)* (1788), 2 T. R. 628.

(*r*) 3 Will. & M. c. 11, s. 6.

(*s*) *R. v. Bramley* (1735), Burr. S. C. 75. So held on account of the notice of inhabitaney arising by the party having been assessed and paid the rate: *per* Bayley, J., *R. v. Christchurch (Inh.)* (1828), 8 B. & C. 663.

(*t*) 35 Geo. 3, c. 101, s. 4.

(*u*) See *post*, p. 687.

(*x*) 6 Geo. 4, c. 57, s. 2.

case where the occupation of a tenement of 10*l.* yearly value was such as to satisfy 6 Geo. 4, c. 57, it was held, that though, as the hiring had taken place after the passing of 1 Will. 4, c. 18, and in consequence of the underletting of a part, no settlement could be gained under that Act by renting the tenement, still it might be acquired by payment of the parochial rates in respect of it (*y*). This important decision appears by a sidewind to render nugatory the strict enactments of 1 Will. 4, c. 18; as in nearly every case the householder who lets lodgings has been rated to and paid parochial rates.

Between the 22nd June, 1795 (the time of passing 35 Geo. 3, c. 101), and 22nd June, 1825 (when 6 Geo. 4, c. 57 passed), a settlement might be gained by residing in a parish for forty days after being rated and paying parochial taxes in respect of a tenement there, of the annual value of 10*l.* or more (*z*), though not rated at 10*l.* (*a*), if all the forty days were subsequent to such payment (*b*). And a settlement may still be gained by a person paying rates in respect of a house of which he is the owner (*c*).

Since 22nd June, 1825, by 6 Geo. 4, c. 57, s. 2, no settlement can be gained by payment of "parochial rates" for any tenement not being the party's own property, unless it answers the requisites of that Act. And there must also be an occupation of such a tenement for one whole year, as a forty days' residence is not sufficient (*d*). The words "parochial rates" in that Act, and "public taxes or levies" of a town or parish in 3 W. & M. c. 11, s. 6, mean the same thing, viz., the taxes and levies collected within a parish, such as poor's rate, church rate (*e*), land tax (*f*). Improvement and lamp rates under an improvement Act for a city, leviable by commissioners and collected by the churchwardens and overseers of the respective parishes or townships (*g*); property tax under 5 & 6 Vict. c. 35, Sched. A., although subsequently repaid by the landlord (*h*); and a borough watch rate, made under 5 & 6 Will. 4, c. 76, and 7 Will. 4 & 1 Vict. c. 8, extending over the whole of a parish, and collected by overseers, are public taxes and

Parochial rates, what.

Public taxes of a parish, what.

What are public taxes and levies of the parish.

(*y*) *R. v. Stoke Damerril* (1837), 6 A. & E. 308. So, though not only had 1 Will. 4, c. 18, not been complied with as to actual occupation of the whole by the tenant, but he had not been assessed to or paid poor's rates for the whole year: *R. v. St. Mary Kalendar* (1839), 9 A. & E. 626.

(*z*) *R. v. Penryn* (1832), 4 B. & Ad. 224; *R. v. St. Pancras* (1823), 2 B. & C. 122.

(*a*) *R. v. Ringstead* (1827), 7 B. & C. 607; *R. v. St. Dunstan's* (1825), 4 B. & C. 686.

(*b*) *R. v. Ringstead*, *ubi sup.*

(*c*) *Gainsborough Union v. Worksop Union* (1873), 37 J. P. 293.

(*d*) *R. v. Westbury-on-Trym* (1857), 26 L. J. M. C. 76.

(*e*) *R. v. Ringstead*, *sup.*

(*f*) *R. v. Teignmouth East (Inh.)* (1830), 1 B. & Ad. 244.

(*g*) *R. v. Guardians of St. Thomas Poor Law Union, Devon* (1870), L. R. 5 Q. B. 371.

(*h*) *St. George's, Hanover Square v. Cambridge* (1867), L. R. 3 Q. B. 1.

levies of the parish (*i*); but a watch rate for a city ward, levied by the alderman and council of each ward, under 10 Geo. 2, c. 22, and collected by the beadle of the ward, is not within the 3 W. & M. c. 11 (*k*), and payment towards a county bridge is not. Again, the words "charged with" in 3 W. & M. c. 11, s. 6, and "assessed to" in 4 & 5 Will. 4, c. 76, s. 66, are construed alike (*l*), and accordingly the occupier of a tenement, who claims a settlement by payment of parochial taxes in respect of it, must be "charged with" as well as pay a parochial rate or tax (*m*); and after such charging and payment it is immaterial that the rate was invalid (*n*).

But a local Act may be so worded as to apportion the rate between an outgoing and incoming tenant during the currency of the rate, and to make the payment by the incoming tenant of his proportion of the rate amount to a payment of rate, notwithstanding the outgoing tenant was originally assessed and continued to stand on the rate book as occupier, and confer a settlement under 3 W. & M. c. 11, s. 6 (*o*). But under the now repealed statute 17 Geo. 2, c. 38, s. 12 (*p*), which formerly provided for the apportionment of poor's rates in case of removing, it was held that an outgoing tenant paying only up to the time of leaving did not acquire a settlement under 3 W. & M. c. 11, s. 6 (*q*).

We have seen that, since 30th March, 1831, it is sufficient, in order to claim a settlement in this right, or in that of renting a tenement, if 10*l.* of the year's rent is paid (*r*). All that is requisite is, that the parish shall rate (*i.e.*, assess or charge) the occupier, so as to show themselves aware that he is in the parish, and that he should pay on such rating (*s*); so that being so rated, whether he occupy rent free in increase of salary due from his landlord, or is a tenant, properly so called, *viz.*, rendering rent, or whether after himself paying the rates he is allowed them in account with his landlord (*t*), is

Mode of
charging the
party with
the rate.

(*i*) *R. v. Everton* (1860), 29 L. J. M. C. 165.

(*k*) *R. v. Christchurch (Inh.)* (1828), 8 B. & C. 660.

(*l*) See *R. v. Hulme (Inh.)* (1843), 12 L. J. M. C. 100.

(*n*) *R. v. St. Olave, Southwark* (1844), 13 L. J. M. C. 161.

(*m*) *R. v. St. Bees* (1808), 9 East, 203.

(*o*) *R. v. St. Marylebone (Inh.)* (1850), 19 L. J. M. C. 201.

(*p*) See 32 & 33 Vict. c. 41, s. 16.

(*q*) *R. v. Everton, sup.*

(*r*) *R. v. Brighton* (1841), 1 Q. B. 674.

(*s*) See judgment of court in *R. v. Heyford (Lower)* (1830), 1 B. & Ad. 75.

(*t*) *R. v. Heyford (Lower), sup.*; *R. v. Axmouth* (1807), 8 East, 383. See the case explained by Lord Denman, on its being cited in *R. v. Bridgenorth* (1839), 10 A. & E. 68. In *R. v. South Kilvington (Inh.)* (1843), 13 L. J. M. C. 3, pauper occupied premises at a yearly rent under an agreement by which the landlord was to pay all rates. The rent was higher on that account. Pauper was assessed to the poor as occupier, but the landlord always paid the rate. Held, that pauper did not gain a settlement by being charged with, or assessed to, or paying

immaterial. Since 6 Geo. 4, c. 57, he need not reside forty days in the parish after payment of such a rate (*u*).

If the premises are rated and the rate paid, the occupier need not be actually named on the rate or assessment itself (*x*). The assessment will be good if the tenement occupied or the occupier are so described as to show that the parish, though ignorant of the occupier's name, are aware (*e.g.*, by collecting rates from him) that he is in fact the occupier (*y*). If both landlord's and tenant's names appear on the rate, the presumption is that the tenant is intended to be rated till the contrary is shown to the sessions (*z*), but which is intended in such case to be rated is a question of fact for the sessions (*a*).

Payment of rates by a joint tenant may be a payment by both (*b*). But if a third person pays a man's rates, there must be an authority from the person assessed to the payer, otherwise such a payment will not confer a settlement on the person assessed (*c*); and secondary evidence of the rate is not admissible where the rate book has not been produced owing to the improper conduct of the party served with the subpoena *duces tecum* (*d*). Payment of the rate may be proved by the receipt for rates signed by the clerk to the collector (*e*).

But where land hired, taken, or inclosed under Acts for relief of the poor (*f*), is let by parish officers to a poor inhabitant, he shall not gain a settlement by reason of his paying parochial taxes for it, either alone or with any other land or tenement (*g*).

This settlement cannot be proved by evidence of payment only without the production of the rate, or accounting reasonably for its non-production (*h*). Evidence.

the poor's rate under stat. 3 Will. & M. c. 11, s. 6, or 4 & 5 Will. 4, c. 76, s. 55: see *R. v. Weobley* (1801), 2 East, 68.

(*u*) *R. v. Ringstead* (1827), 7 B. & C. 607, relied on *arguendo*, in *R. v. St. Mary Kalender* (1839), 9 A. & E. 628.

(*x*) *R. v. Hulme* (1843), 12 L. J. M. C. 100; *R. v. Walsall* (1777), Cald. 35; *R. v. Painswick* (1758), Burr. S. C. 465.

(*y*) In *R. v. Walsall*, *sup.*, "late Lowbridge's house," held sufficient rating coupled with payment, though actual occupier not named: see *R. v. Llangammarch* (1788), 2 T. R. 628; *R. v. St. Anne, Westminster* (1860), 29 L. J. M. C. 78.

(*z*) *Per Buller, J.*, in *R. v. Rainham* (1793), 5 T. R. 240; *R. v. St. Lawrence, Winchester* (1784), 4 Doug. 190.

(*a*) *R. v. Fulkestone* (1789), 3 T. R. 505.

(*b*) *R. v. Huthwaite (Inh.)* (1852), 21 L. J. M. C. 189.

(*c*) *R. v. Bengeworth (Inh.)* (1854), 23 L. J. M. C. 124; *R. v. Weobley* (1801), *sup.*; *R. v. Bridgenorth* (1839), *sup.*; and see also *Hughes v. Chatham* (1843), 13 L. J. C. P. 44.

(*d*) *R. v. Llanfarthly* (1853), 2 E. & B. 940.

(*e*) *R. v. St. Mary, Warwick* (1853), 22 L. J. M. C. 109.

(*f*) *E.g.*, under 59 Geo. 3, c. 50, as amended by 1 & 2 Will. 4, c. 42, and c. 59, as to crown lands.

(*g*) 1 & 2 Will. 4, c. 42, s. 5; and c. 59, s. 2.

(*h*) *R. v. Coppull* (1801), 2 East, 25.

Sect. 66 of 4 & 5 Will. 4, c. 76, which enacts that no settlement shall be acquired or completed by occupying a tenement unless the person occupying the same shall have been assessed to the poor's rate, and shall have paid the same in respect of such tenement for one year applies only to settlements by occupation and leaves the settlement by payment of rates on the same footing as before, viz., under 3 & 4 W. & M. c. 11, s. 6.

8. *Of Settlement by Estate.*

Before 1772 a person who enjoyed a legal or equitable estate in land of whatever value gained a settlement by forty days' residence in the parish where it lay, and this was termed a settlement by estate. A person therefore buying land, at however small a price, acquired a settlement in the parish, and this right being abused led to the passing in the year 1722 of an Act 9 Geo. 1, c. 7, s. 5, by which it was enacted that no person shall be deemed to acquire a settlement in any parish or place "by virtue of any purchase of any estate or interest in such parish or place whereof the consideration for such purchase doth not amount to the sum of 30*l.* *bonâ fide* paid for any longer or further time than such person or persons shall inhabit in such estate, and shall then be liable to be removed to such parish or place where such person or persons were last legally settled, before the said purchase and inhabitaney therein."

This enactment makes an exception only with regard to lands acquired by purchase and being of a less value than 30*l.* Cases not within the statute still remain subject to the general rules governing the law of settlement by estate, and with these we will proceed to deal.

What amount of estate will confer this settlement with regard to 9 Geo. 1, c. 7.

The estate must be an interest issuing out of realty, so that an annuity charged on personalty confers no settlement (*i*). A right of common actually enjoyed may confer it; but a mere inalienable franchise would not suffice (*k*). Nor is a settlement gained in the case of a burgess of a borough, entitled as such to receive a share of the rent of corporate land (*l*). But the nature of the tenure is immaterial; nor is the duration of the estate material, provided it is of sufficient permanency, and so conferred by will or otherwise, as to ensure to the party residing a right to remain for forty days (*m*). Thus it may be a freehold estate in fee (*n*), or for life (*o*), or a copyhold (*p*),

(*i*) *R. v. Stockley Pomroy* (1774), Burr. S. C. 762.

(*k*) *R. v. Warkworth* (1813), 1 M. & S. 473.

(*l*) *R. v. Belford (Inh.)* (1829), 10 B. & C. 54.

(*m*) See *R. v. Cassington* (1831), 2 B. & Ad. 874.

(*n*) *R. v. Great Farringdon* (1796), 6 T. R. 679.

(*o*) *R. v. Shenston* (1758), Burr. S. C. 468.

(*p*) *R. v. Haddenham (Inh.)* (1812), 15 East, 463, even before admittance; *R. v. Thruscross* (1834), 1 A. & E. 126: see *post*.

in dower, and either by residence for forty days after dower assigned, or a like residence after the husband's death to which quarantine the widow is entitled (*q*), a leasehold interest determinable on lives (*r*), or for a term of years (*s*), or guardianship in socage (*t*), or even a weekly tenancy, as where a man, who married a woman being the weekly tenant of a cottage, resided in it for forty days, and occupied the cottage for seven years, paying the weekly rent, was held to have acquired an estate by marriage, the payment of rent by him, after marriage, being equally consistent with a continuance of the old weekly tenancy, as with the creation of a new one in him, and the residence was sufficient, notwithstanding the tenancy was not for forty days certain (*u*); but not a mere tenancy at will (*x*). The estate must be vested in possession and not an estate in remainder or reversion (*y*), or an annuity though specifically charged on an estate if unappropriated to the holder of the estate (*z*), or a mere licence (*a*).

Residence for forty days in a parish in which the pauper had a freehold subject to a lease for years is sufficient to establish a settlement by estate (*b*).

It is not necessary that strict proof of an indefeasible title should be given; for if the party has had twenty years undisturbed possession, or even rather less by a few weeks, without any acknowledgment, the possession is a sufficient title from which to presume a grant, though it had its origin in wrong (*c*). Thus, where a cottage was built on the waste thirty years before, and had descended to the daughter, the lord making no claim, it was holden to be a sufficient title to found a settlement (*d*). Again, where a party or his son has resided for twenty years, within a few

Inferring
original title
from long
possession.

(*q*) *R. v. Painswick* (1774), Burr. S. C. 783; *R. v. North Weald Bassett* (1824), 2 B. & C. 724; *R. v. Long Wittenham* (1784), 4 Doug. 193.

(*r*) *R. v. Marwood* (1756), Burr. S. C. 386.

(*s*) *Mursley v. Grandborough* (1717), Stra. 97.

(*t*) *R. v. Oakley* (1809), 10 East, 491.

(*u*) *R. v. Thornton (Inh.)* (1860), 29 L. J. M. C. 162.

(*x*) *R. v. Widworthy* (1737), Burr. S. C. 109. But this case was decided on peculiar facts, and see now *R. v. Thornton, sup.*; and *R. v. Halifax* (1855), 24 L. J. M. C. 65.

(*y*) *R. v. Willoughby-with-Sloothby* (1829), 10 B. & C. 62; *R. v. Ringstead* (1829), 9 B. & C. 218; *R. v. Easington* (1791), 4 T. R. 177.

(*z*) *R. v. Stockley Pomroy* (1774), Burr. S. C. 762; *R. v. Melbourn* (1745), *id.* 244.

(*a*) *R. v. Horndon-on-the-Hill* (1816), 4 M. & S. 562; *R. v. St. Mary, Castlegate* (1852), 21 L. J. M. C. 106.

(*b*) *R. v. Houghton-le-Spring* (1801), 1 East, 254; *per* Bayley, J., in *R. v. Staplegrave* (1819), 2 B. & A. 527.

(*c*) *R. v. Butterton* (1796), 6 T. R. 554; but see *R. v. Chew Magna* (1830), 10 B. & C. 747, where fifteen years' possession was held not to confer a settlement. Possession, to confer a right, must be adverse against a person having a legal title: *per* Littledale, J., in *R. v. Okeford Fitzpaine (Inh.)* (1830), 1 B. & Ad. 259.

(*d*) *Ashbrittle v. Wyley* (1724), Stra. 608.

weeks, on an estate as given by a relative, although there be no proof of any conveyance, yet a settlement will be gained; for "the strict rules which prevail on the trials of ejectments ought not to be applied to settlement cases"; and under such circumstances a conveyance, if necessary, might be presumed (*e*).

Possession and residence undisturbed for more than forty days under a claim of title without fraud.

An undisturbed residence on property, which the pauper claimed as his right, without any consciousness of wrong, conferred a settlement (*f*). If a tenant from year to year dies intestate, his administrator has the same yearly interest in the land which his intestate had (*g*), and will acquire a settlement by subsequent residence in the parish for forty days after administration duly taken out (*h*). In an early case (*i*), it was held that after an undisturbed and exclusive possession of leasehold property by one of several next of kin, for very near twenty years, it must be presumed that the other next of kin agreed with him as to their respective shares.

When the estate is an equitable one.

An equitable estate is sufficient to confer a settlement; so that a settlement may be acquired by the mortgagor, who has only the equity of redemption as well as by the mortgagee who has the legal estate, if in possession (*k*); but not, if being one of several mortgagors, he has sold his share of the equity of redemption (*l*). So where a mortgagor in possession gave by will all his real and personal property to trustees upon trust to sell and apply the proceeds in payment of the mortgage and other debts and the residue to his wife, it was held that she had an equitable estate before sale sufficient to confer a settlement (*m*). Where a father devised an estate to a trustee, "in trust to let the same during his daughter's life," and, on his death, the daughter, who had lived with him, continued to reside on the premises, without interference from the trustee, for more than forty days, it was holden that she had acquired a settlement (*n*); and so on a devise to a wife for life and after her death the land to be sold within six months and be equally divided among the children, one of the children

(*e*) *R. v. Butterson* (1796), 6 T. R. 554.

(*f*) *R. v. Staplegrave* (1819), 2 B. & Ald. 527, remarked on by Bayley, J., in *R. v. Belford* (1829), 10 B. & C. 61.

(*g*) *Doe d. Shore v. Porter* (1789), 3 T. R. 13, as cited by Lawrence, J., in *R. v. Stone* (1795), 6 T. R. 298, where an executor (who had not taken out probate) obtained a settlement.

(*h*) *R. v. Great Glenn (Inh.)* (1833), 5 B. & Ad. 188; *R. v. Dorstone* (1801), 1 East, 296.

(*i*) *R. v. Cold Ashton* (1758), Burr. S. C. 444; cited in *R. v. Canford Magna* (1817), 6 M. & S. 355; and in *R. v. Okeford Fitzpaine* (1830), 1 B. & Ad. 258.

(*k*) *Per* Lord Mansfield, in *R. v. St. Michael's, Bath* (1781), Cald. 110; see *R. v. Cassington* (1831), 2 B. & Ad. 877, *per* Parke, B.

(*l*) *R. v. Cregrina* (1835), 2 A. & E. 536.

(*m*) *R. v. Aslackby* (1836), 5 A. & E. 200; *R. v. Ardleigh* (1837), 7 A. & E. 70.

(*n*) *R. v. Holm, East Waver Quarter* (1812), 16 East, 127.

who resided for forty days after the death of the wife, and before sale, acquired a settlement (*o*), but in this case the legal estate was not in the executors but in the children. So a devise of a long term of years to A. of a cottage, with an expression of testator's will that the paupers B. and C. should have liberty during their life to dwell in it, was held to confer a settlement on them (*p*).

On a sale of land before the full purchase-money is paid, the vendor has a beneficial interest, and is something more than a mere trustee. Thus, where a written agreement was made for the purchase of an estate to be paid for by two instalments, the first payable within a few days after the signing the agreement, and the last in seven months, and the vendor was to make out a good title on payment of the last instalment, and to convey the premises, but the purchaser was to be let into possession on payment of the first. The purchaser paid the first, was let into possession, and continued possessed a year and a half; but the last instalment was never paid, nor any conveyance ever executed, and the purchaser afterwards gave up the contract on receiving back part of the first instalment. He was held not to acquire an equitable estate under this contract, so as to gain a settlement under 9 Geo. 1, c. 7, s. 5 (*q*). So where the devisee of a copyhold estate entered and occupied, and resided forty days before admittance, though he had not an actual legal or equitable estate, yet as he was an occupier who by doing an act which he might at any time do could have obtained the legal estate, he was held to have acquired a settlement (*r*).

Among the parties who may acquire this settlement by residing forty days in the parish where they occupy an estate, are, an infant (*t*); an executor, even before probate actually obtained (*u*); a widow, after her dower has been assigned, but not previously (*x*), unless she resides for forty days after death of her husband in virtue of her right of quarantine (*y*); a guardian in socage (*z*); but the father of a girl, to whom, at the age of sixteen, an estate came by devise, was held to be her natural guardian and not her guardian in socage, and therefore not settled in respect of residence on it with her for five years (*a*) (and it must be borne in mind that guardianship

Who may
acquire such
an estate.

(*o*) *R. v. BURGATE* (1851), 23 L. J. M. C. 143.

(*p*) *R. v. Woburn* (1774), Burr. S. C. 785.

(*q*) See *per* Bayley, J., in *R. v. GEDDINGTON* (1823), 2 B. & C. 134.

(*r*) *R. v. Thruscross* (1834), 1 A. & E. 126.

(*t*) *R. v. Hasfield* (1739), 2 Stra. 1131.

(*u*) *R. v. Stone* (1795), 6 T. R. 295; see *R. v. Asbridge* (1835), 2 A. & E. 520. In *R. v. Stone*, the probate was not taken out till after a lapse of three years' residence, and three days only before the removal.

(*x*) *R. v. North Weald Bassett* (1824), 2 B. & C. 724.

(*y*) *R. v. Long Wittenham* (1784), 4 Doug. 193.

(*z*) *R. v. Oakley* (1809), 10 East, 491.

(*a*) *R. v. Sherrington (Inh.)* (1832), 3 B. & Ad. 714.

in socage only applies to a legal estate (*b*); an administrator or administratrix, though the administration was taken out by a widow to her husband, in order to obtain a settlement by so doing (*c*); and sole next of kin where no administration is taken out (*d*); the husband of an administratrix entitled as *cestui que trust* to the residue of a term of years (*e*); a parcener (*f*); formerly the husband of a woman whose estate is vested in trustees for her separate use (*g*); of a woman who was a tenant from year to year of premises being under the annual value of 10*l.* (*h*); or of a woman who was a weekly tenant (*i*); but it may be considered doubtful whether a man by marrying a tenant at will merely can gain this settlement (*k*); but a settlement is gained by the husband of a woman who, after the passing of 59 Geo. 3, c. 50, had become a yearly tenant of premises at a rent under 10*l.* per annum (*l*); and a schoolmaster appointed by trustees, and residing in the schoolhouse as part of the benefits of his office, and who was to be paid out of the rents of a farm devised to the trustee for that among other purposes (*m*).

Where, before the Forfeiture Act, 1870, after the attainder of a party, and his discharge from imprisonment under the sign manual, he purchased a copyhold, and lived upon it for several years, the court refused to inquire into his capacity to hold it, and said that, whether the crown could have impeached his title or not, he acquired a settlement by residing on it forty days without impeachment, in fact, and communicated that settlement to his child (*n*).

Licence not
sufficient.

But a settlement will not be acquired by any length of occupation which is merely permissive. Thus, where a party erected a cottage by the licence of the lord of the manor, and enclosed a garden from the waste, rendering an annual rent of 10*s.* 6*d.* as a quit-rent, and resided upon the premises for a year and a half, and the entry of the licence on the court rolls was the only evidence of title, this possession was held

(*b*) *R. v. Toddington* (1818), 1 B. & A. 560.

(*c*) *R. v. Great Glenn* (1833), 5 B. & Ad. 188; see also *R. v. Barnard Castle* (1834), 2 A. & E. 108. In these cases the question of fact for sessions on an occupation by a widow of a tenant after the husband's death, was whether she then commenced a new tenancy on her own account, or continued in possession entitled to take out administration to her husband, and by so doing to become tenant from year to year in his right.

(*d*) *R. v. Horsley* (1807), 8 East, 405.

(*e*) *Mursley v. Granborough* (1717), Stra. 97.

(*f*) *R. v. Dorstone* (1801), 1 East, 296.

(*g*) *R. v. Offchurch* (1789), 3 T. R. 114.

(*h*) *R. v. Fynyceynhanarn* (1827), 7 B. & C. 233.

(*i*) *R. v. Thornton (Inh.)* (1860), 29 L. J. M. C. 162.

(*k*) See *R. v. Halifax* (1835), 24 L. J. M. C. 65.

(*l*) *R. v. North Cerney (Inh.)* (1832), 3 B. & Ad. 463.

(*m*) *R. v. Oversby-le-Moor* (1812), 15 East, 356.

(*n*) *R. v. Haddenham (Inh.)* (1812), 15 East, 463.

to confer no settlement (*o*). The same was held where the land was taken in the character of a servant in lieu of wages (*p*).

So, no settlement will be gained by a holding over which is not adverse, and lasts sixteen years only (*q*).

We now come to the consideration of those cases affected by 9 Geo. 1, c. 7.

The term "purchase" in the statute is not to be taken in its legal acceptation, but in its popular sense; and, therefore, it does not extend to devises or gifts, or other methods of acquisition, but is confined (in terms) to the particular case of a purchase for money (*r*). Thus, conveyances to relatives in consideration of natural love and affection (*s*), or for a mixed consideration of natural affection and an inadequate sum of money (*t*), are not within the Act, and the parties to whom the lands are conveyed derive settlements from them. But if a pecuniary consideration, however small, be the sole foundation of the grant, it is to be considered as a purchase within the statute, and not as a voluntary gift (*u*).

It appears, from many cases, that a husband might acquire a settlement by possession of an estate in right of his wife, which came to him by marriage, whatever might be its value, and even though, being purchased by her for less than 30*l.*, she could have acquired no settlement by residing on it herself, had she remained single (*x*); but see now the provisions of the Married Women's Property Act, 1882. And so, where a man married a weekly tenant of a cottage, resided forty days, and paid the rent for years, he was held to have acquired a settlement by estate, though the tenancy was not originally for forty days certain (*y*).

The next question under 9 Geo. 1, c. 7, is the consideration-money.

The consideration-money, where the estate is purchased, must, in fact, amount to 30*l.*; but where it was expressed in the conveyance as 28*l.*, and 30*l.* was, in fact, paid, the estate was holden to confer a settlement (*z*). If the 30*l.* be paid by the purchaser, as a consideration for the purchase, it is

What estate is within the restriction of 9 Geo. 1, c. 7, as being acquired by "purchase"?

Construction of 9 Geo. 1, c. 7, as to the consideration-money requi-

(*o*) *R. v. Horndon-on-the-Hill* (1816), 4 M. & S. 562; *R. v. Cuddington* (1845), 14 L. J. M. C. 182.

(*p*) *R. v. South Newton, Wills* (1830), 10 B. & C. 838.

(*q*) *R. v. Axbridge* (1835), 2 A. & E. 520.

(*r*) *R. v. Marwood* (1756), Burr. S. C. 386.

(*s*) *R. v. Marwood, sup.*

(*t*) *R. v. Upton* (1789), 3 T. R. 251; see *R. v. Piddleshinton* (1832), 3 B. & Ad. 460; *R. v. Hatfield Broad Oak* (1832), *id.* 566; *R. v. Lyddlinch* (1832), 4 B. & Ad. 150. Whether a voluntary conveyance will discharge a certificate has not been expressly decided: *R. v. Cussington* (1831), 2 B. & Ad. 874.

(*u*) *R. v. Warblington* (1786), 1 T. R. 241.

(*x*) *R. v. Umington* (1766), Burr. S. C. 566.

(*y*) *R. v. Thornton (Inh.)* (1860), 29 L. J. M. C. 162.

(*z*) *R. v. Scammonden* (1789), 3 T. R. 474.

site to a
"purchase"
within it.

immaterial how it is to be distributed; so that it is no objection, where the estate is copyhold, that part was applied in payment of the fines and fees due on the transfer (*a*). But the sum paid by the purchaser of a copyhold estate to his own attorney for the transfer, is no part of the consideration for the purchase within the meaning of this Act (*b*).

A lease for ninety-nine years of land, in consideration of a rent of 1*l.* 11*s.* 6*d.*, and of the lessee having built a house thereon, which did not cost 30*l.*, the whole property being of less annual value than 10*l.*, was held to be a purchase for less than 30*l.*, and, therefore, conferred no settlement (*c*); though the building of a house may form part of the consideration, and be treated as part of the purchase-money (*d*).

If the money be paid to the vendor, it is immaterial whether the purchaser pay it out of his own funds or borrow it on credit (*e*); or though the consideration is a debt due from the vendor (*f*); or though part of the money be given to the vendee by the parish officers; for if without fraud, it is sufficient to satisfy the statute (*g*). Nor is it any objection that the vendee mortgages the estate itself to raise part of the money which he pays; as, if he purchase for 39*l.* and borrow 30*l.* on mortgage to pay: so that the full price is paid to the vendor (*h*).

But the purchase of an estate subject to a mortgage is not sufficient for the purpose of gaining a settlement, unless the money actually paid for the equity of redemption amount to 30*l.* (*i*). And, if the original purchase be under 30*l.* no subsequent improvements will be sufficient to satisfy the statute for the purpose of gaining a settlement (*k*). But, on the grant of a lease for three lives, in consideration of an annual rent-charge of 25*s.*, and of the building of a house at a cost of 85*l.*, the house being built at the time of granting the lease, there was held to be a *bonâ fide* payment of a consideration of 30*l.* for the purchase (*l*). But if a purchaser for less than 30*l.* improves the estate, sells it, and repurchases it again for more than 30*l.*, he may gain a settlement under the latter purchase (*m*).

(*a*) *St. Paul's, Walden v. Kempston* (1726), *Foley's Poor Laws*, 238; cited in *R. v. Warblington* (1786), 1 T. R. 244.

(*b*) *R. v. Cottingham* (1827), 7 B. & C. 603.

(*c*) *Wendron v. Stithians* (1854), 24 L. J. M. C. 1.

(*d*) *R. v. Belford* (1863), 32 L. J. M. C. 156.

(*e*) *R. v. Chailey* (1796), 6 T. R. 755.

(*f*) *R. v. Stockland* (1741), Burr. S. C. 169.

(*g*) *St. Paul's, Walden v. Kempston*, *sup.*

(*h*) *R. v. Tedford* (1735), Burr. S. C. 57.

(*i*) *R. v. Mattingley* (1787), 2 T. R. 12.

(*k*) *R. v. Dunchurch* (1766), Burr. S. C. 553; *R. v. Carlton* (1849), 19 L. J. M. C. 100.

(*l*) *R. v. Belford*, *sup.*

(*m*) *R. v. Stanfield* (1743), Burr. S. C. 205.

If, on a purchase for 5*l.* the purchaser pays 12*l.* down, the vendor allowing the rest of the purchase-money to remain on mortgage of the premises, and, after some years' residence, the purchaser sells again, his vendee paying the remainder of the original purchase-money to the original vendor, the Court held this to be a purchase for 12*l.* only and within the statute, and the pauper gained no settlement (*n*). Nor is a settlement gained where the interest of the pauper is an equitable right only and not an equitable interest (*o*).

Although the restrictions which we have noticed may prevent a party from acquiring such a settlement as will continue when his interest in the premises has ceased, and he has left them, yet while he "inhabits on such estate" as his own, he will be irremovable from it. This right to reside on a man's own estate is founded on Magna Charta, which enacts that no man shall be disseised of his freehold (*p*), although, as we have seen, a widow does not gain a settlement in her own right by residing on an estate out of which she is dowerable before the assignment of dower (*q*), yet where she resides there with her children, who are of tender years, she, being by law their natural guardian, is not removable from the estate (*r*).

To enable a party to gain a settlement by estate, there must be a residence of at least forty days (*s*) in the parish where the estate lies (*t*); besides which it is now enacted (*u*), that no person shall be deemed, adjudged, or taken to retain any settlement gained by virtue of any possession of any estate or interest in any parish for any longer or further time than such person shall inhabit within ten miles thereof; and in case such person shall cease to inhabit within such distance, and hereafter become chargeable, such person shall be liable to be removed to the parish wherein, previously to such inhabitancy, he may have been legally settled; or, in case he may have, subsequently to such inhabitancy, gained a legal settlement in some other parish, then to such other parish.

This enactment embraces a settlement claimed under 13 & 14 Car. 2, c. 12, s. 1, by "coming to settle" on a tenement of the yearly value of 10*l.* in right of the pauper's own estate in it, but such a settlement is extinguished by ceasing to inhabit within ten miles from the parish (*v*). However, the only

What parties are irremovable from an estate, though they have not acquired a settlement.

Residence necessary to a settlement by estate.

Effect of ceasing to inhabit.

(*n*) *R. v. Olney* (1813), 1 M. & S. 387.

(*o*) See *R. v. Long Bennington* (1817), 6 M. & S. 403, cited by Bayley, J., in *R. v. Geddington (Ink.)* (1823), 2 B. & C. 132.

(*p*) *R. v. Aythorpe Rooding* (1756), Burr. S. C. 412.

(*q*) *Aule*, p. 693.

(*r*) *R. v. Wilby* (1814), 2 M. & S. 504; *R. v. Matlock (Ink.)* (1834), 1 A. & E. 124; *R. v. Brington (Ink.)* (1827), 7 B. & C. 546.

(*s*) *R. v. West Shefford* (1751), Burr. S. C. 307.

(*t*) *Ryslip v. Harrow* (1696), 2 Salk. 524.

(*u*) 4 & 5 Will. 4, c. 76, s. 68.

(*v*) *R. v. St. Giles's-in-the-Fields* (1842), 11 L. J. M. C. 18.

settlement thus defeasible is that of the individual who possesses the interest or estate, and a settlement acquired by derivation through him is not affected. So that, where a man possessed of an estate went with his son to reside more than ten miles from the parish where it lay, the son retained the derivative settlement in that parish, he being emancipated at the time he so left it (*x*); but if the son be unemancipated at the time when his father so left the parish, he also loses the settlement of his father, and so, also, would his mother lose it (*y*). Being removed by order of two justices, under 9 Geo. 4, c. 40, to a county lunatic asylum more than ten miles off is a "ceasing to inhabit" (*z*).

The distance of ten miles must be computed, as the crow flies, from the house which the person inhabits to the boundary of the parish in which the estate is (*a*).

Residence,
where.

The residence need not be actually on the estate so long as it is in the parish; it may be on another person's estate or at an inn; and the forty days' residence need not be forty successive days, if there be that amount of residence in the whole (*b*). But the estate must be vested in the party during the residence; and therefore, where a person entitled to administration of the effects of a deceased person resided on his leasehold premises for three years, but took out administration only eighteen days before removal, it was held that this grant, though for some purposes having relation to the death, had not this effect in reference to the settlement before it was taken out; so that no settlement could be gained under the grant. And therefore, *à fortiori*, where administration was not taken out till after the lease had expired and the order of removal made (*c*). But a sole next of kin who qualifies by residence gains a settlement (*d*). Where a person, having a sufficient estate within a parish, is actually resident on it, he is settled in that parish, provided he has resided there in all forty days, though they are not continuous, and he has been in the interval settled elsewhere (*e*).

Certificated
persons.

It was formerly thought that a person, residing in a parish under a certificate, might obtain a settlement there by estate (*f*), notwithstanding the provisions of the Act of 1697 (*g*), which provided "that no person who shall come

(*x*) *R. v. Hendon (Inh.)* (1842), 12 L. J. M. C. 1.

(*y*) *R. v. Llansaintfrail* (1853), 23 L. J. M. C. 5.

(*z*) *R. v. Whissendine (Inh.)* (1842), 11 L. J. M. C. 42.

(*a*) *R. v. Saffron Walden* (1846), 15 L. J. M. C. 115.

(*b*) *R. v. St. Nyott's* (1739), Burr. S. C. 132; *R. v. Sourton* (1738), Andrews, 345.

(*c*) *R. v. Widworthe* (1737), Burr. S. C. 109.

(*d*) *R. v. Horsley* (1807), 8 East, 405.

(*e*) *R. v. Knaresborough* (1851), 20 L. J. M. C. 147.

(*f*) *R. v. Deddington* (1743), Burr. S. C. 220.

(*g*) 9 & 10 Will. 3, c. 11.

into any parish by certificate shall be adjudged by any act whatsoever to have procured a legal settlement in such parish unless he shall *bonâ fide* take a lease of a tenement of the value of 10*l.*, or shall execute some annual office in the parish, being legally placed there." Upon this Act it has been decided that the purchase of an estate for 30*l.* and upwards by a certificated party was such an act of his own as under the statute debarred him from obtaining a settlement (*h*).

But where such a party became possessed of an estate in the parish where he was resident, by descent, or act, or operation of law, or for a mixed consideration, consisting partly of money and partly of love and affection, the certificate was held to be discharged and the settlement by estate to be gained (*i*). So, where such a party came to settle on a tenement of 10*l.* a year, he was held not to be residing in the parish under the certificate, but to be irremovable as soon as he came into the parish, though he could not gain a settlement until he had resided forty days (*k*).

9. Irremovability of Poor Persons.

The status of irremovability now conferred by recent legislation materially diminishes the importance of the law of settlement generally.

No person shall now be removed, nor shall any warrant be granted for the removal of any person, from any parish or any part of a union in which such person shall have resided for one year next before the application for the warrant (*l*). And in computing the time of such person's residence within a union, in which is comprised the parish of his settlement, as well as other parishes, any period of time during which the person may have resided in the parish of his settlement is not to be excluded in the computation of the time of residence required to render him exempt from removal (*m*); that is to say, the term may be composed of residence in the parish of settlement within the union, or partly within the parish of settlement and partly within other parishes in the same union, or in different parishes, neither of which is the parish of settlement.

(*h*) *R. v. Great Driffield* (1828), 8 B. & C. 684.

(*i*) *Ibid.*; *R. v. Upton* (1789), 3 T. R. 251; *R. v. Cassington* (1831), 2 B. & Ad. 874.

(*k*) *R. v. Nacton (Ink.)* (1832), 3 B. & Ad. 543.

(*l*) Originally, under 9 & 10 Vict. c. 66, s. 1, five years; altered to three by 24 & 25 Vict. c. 55, s. 1; and to one by 28 & 29 Vict. c. 79, s. 8.

(*m*) 27 & 28 Vict. c. 105, s. 1; *R. v. Bolton-le-Sands* (1865), 35 L. J. M. C. 54.

As to break
of residence.

A union under 24 & 25 Vict. c. 55, s. 1, extends to a district incorporated under a local Act, and formed of several parishes, though there is no common fund for the district (*n*).

Where there has been an apparent disruption of the residence of the pauper, it becomes a question of domicile of the party, though absent; and it is an important element to ascertain whether there was an *animus revertendi*. A temporary absence while at work is no break of residence. Thus, where a weaver, leaving his wife and family in a parish where he occupied rooms, went to seek work or relief in another parish and obtained it for some weeks, and then returned to his wife and family, he was held not to have broken his residence (*o*); and it was further held that the question whether there has been an *animus revertendi* is a question of fact which should be decided by the sessions (*p*); nor is it a break of residence to stay on a visit a few nights out of the parish, although the pauper has no settled residence (other than the workhouse) in the parish (*q*); and temporary absence out of the parish merely for the purpose of fulfilling a contract, and with the intention of returning, is no break (*r*). But where a tailor went out of the parish of his residence to work by the week as assistant to another tailor, at certain wages per week and board and lodging, with a view to stay as long as he and his employer could agree, and in case of disagreement to return, and he stayed for ten weeks, and then, because they could not agree, gave a week's notice and left, and returned to his former parish of residence, he was held to have broken his residence and to be removable to his parish of settlement (*s*). And residence was also held to be broken where the pauper, being chargeable to the respondent union, received notice to quit the premises which he occupied, and took a house which was situate in a parish in another union, although the pauper was ignorant of that fact. He removed to the house and slept one night, when he was told that his residence in the respondent union had been broken, and he at once returned to a house within that union. It was held that the pauper left the parish with the intention of residing elsewhere, and that there was such a break in his residence as to destroy his status of irremovability (*t*).

Break of resi-
dence, what.

A domestic servant, leaving the place of her irremovability and going into service in another union upon a month's trial,

(*n*) *The Guardians of the Poor of Machynulleth Union v. Churchwardens and Overseers of the Lower Division of the Parish of Pool* (1869), L. R. 4 Q. B. 592.

(*o*) *R. v. Tacolnestone* (1849), 18 L. J. M. C. 44.

(*p*) *Ibid.*

(*q*) *R. v. St. Ives Union* (1872), L. R. 7 Q. B. 467.

(*r*) *R. v. Overseers of Brighthelmstone* (1854), 24 L. J. M. C. 41.

(*s*) *R. v. Worcester Poor Law Union* (1874), L. R. 9 Q. B. 340.

(*t*) *Newark Union v. Glanford Brigg Union* (1877), 2 Q. B. D. 522.

taking her clothes with her, and having no residence during the month in the former place, has broken her residence thereby, although she intended, in case of being dismissed, of returning there, as she in fact did afterwards (*u*).

A pauper may continue to reside in a parish where he has had lodgings, which from want he had to give up, and afterwards wanders houseless about the parish, sleeping in the open air at night on a doorstep, and other places, though he went at night to sleep at a refuge for the houseless poor out of the parish, returning in the day to the parish (*x*).

The widow of a man who had lived with her in a parish so as to acquire irremovability, and then enlisted as a soldier and went abroad accompanied by her, and died abroad in the service, when she returned to the parish was held to be removable, as his status was lost at his death (*y*). But where the pauper is a widow who, previously to her husband's death, lived with him in the same parish, the period may be made up partly as wife and partly as widow (*z*); this case is now overruled so far as the acquirement of a settlement is concerned, but it is submitted the case is still good law for the purpose of acquiring a status of irremovability (*a*).

To break the residence the leaving must be voluntary, and mere bodily removal while unable to exercise will power is not sufficient. Thus, where a pauper, seized with madness in a union where she was irremovable, was conveyed to the house of her parents in a different union for one night, and thence to the workhouse of the same union, and seven days afterwards to the county lunatic asylum, she did not lose her irremovability by reason of change of residence, and the order of maintenance was made on the union of the place where she had acquired irremovability (*b*).

A child, living at home with his parents, does not lose his status of irremovability by procuring admission into a school supported by charitable contributions, and continuing there until discharged by the rules of the school, he returning to his father and mother (*c*).

By 9 & 10 Vict. c. 66, s. 1, it is enacted that the time during which any person shall be a prisoner in a prison, or shall be serving his Majesty as a soldier or militiaman during

Exclusion from the computation of time of residence.

(*u*) *R. v. Guardians of Glossop Union* (1836), L. R. 1 Q. B. 227. But having a residence to return to is not now an essential element in judging of the intention to return: see Blackburn, J.'s, judgment in *R. v. St. Ives Union* (1872), L. R. 7 Q. B. 467.

(*x*) *R. v. St. Leonard's, Shoreditch (Inh.)* (1865), L. R. 1 Q. B. 21.

(*y*) *Overseers of Easton v. Overseers of St. Mary's, Marlborough* (1867), L. R. 2 Q. B. 128.

(*z*) *R. v. Glossop* (1848), 17 L. J. M. C. 171.

(*a*) *Medway Union v. Redminster Union* (1889), 14 A. C. 465.

(*b*) *R. v. Whitby Union* (1870), L. R. 5 Q. B. 325.

(*c*) *Guardians of Kenley Union v. Guardians of Abingdon Union* (1870), 30 L. J. M. C. 153; *sub nom. R. v. Abingdon Union*, L. R. 5 Q. B. 406.

training (*d*), or as a marine or sailor, or reside as an in-pensioner in Greenwich or Chelsea Hospitals, or shall be confined in a lunatic asylum, or house duly licensed, or hospital registered for the reception of lunatics, or as a patient in a hospital (*e*), or during which any such person shall receive relief from any parish (*f*), or shall be wholly or in part maintained by any rate or subscription raised in a parish in which such person does not reside, not being a *bond fide* charitable gift, shall for all purposes be excluded in the computation of time, after which a person shall not be removable; and that the removal of a pauper lunatic to a lunatic asylum under the provision of any Act relating to the maintenance and care of pauper lunatics shall not be deemed a removal within the meaning of the Act (*g*); and the removal of any lunatic pauper to any asylum, licensed house, or registered hospital, or of any pauper otherwise than under an order of removal from his place of abode in any parish in a union to the workhouse of such union shall not be an interruption of the residence of such pauper within 9 & 10 Vict. c. 66; but the time spent in such lunatic asylum, licensed house, or registered hospital, or workhouse, or the time during which such person shall receive relief from the common fund shall be excluded for the computation of time to exempt from removal (*h*). And the time during which any person is detained in a retreat under the Habitual Drunkards Act (42 & 43 Vict. c. 19), s. 32, shall also be excluded from the time of computation, and the like with respect to a child detained in a school under the Industrial Schools Act (29 & 30 Vict. c. 118), s. 31.

Widows irremovable after husband's death.

No woman, residing in any parish with her husband at the time of his death, shall be removed from such parish for twelve calendar months next after his death, if she so long continue a widow (*i*). The wife and husband may be said to reside within this section if she lives in a house which is his

(*d*) *Horton v. Leeds* (1855), 25 L. J. M. C. 38.

(*e*) An institution for epileptics, partly endowed and partly supported by the patients' payments, is a hospital within this proviso: *Ormskirk Union v. Chorlton Union*, [1903] 1 K. B. 19; affirmed C. A., [1903] 2 K. B. 498.

(*f*) See 4 & 5 Will. 4, c. 76, s. 56; *R. v. St. George's, Bloomsbury* (1863), 32 L. J. M. C. 217; *R. v. Elvet (Ink.)* (1859), 29 L. J. M. C. 17. The maintenance of a lunatic child over the age of sixteen in a county asylum, to which she was sent under an order of justices, at the charge of the parish in which her widowed mother had lived, and from which she was irremovable by reason of residence, is not to be deemed to be relief given to the mother, so as to exclude the time during which the child was in confinement from the computation of the time of the mother's residence: *R. v. Overseers of St. Mary, Islington* (1862), 31 L. J. M. C. 233.

(*g*) 9 & 10 Vict. c. 66, s. 1. These provisoes are retrospective: see *R. v. Christchurch* (1848), 18 L. J. M. C. 28.

(*h*) 12 & 13 Vict. c. 103, s. 4.

(*i*) 9 & 10 Vict. c. 66, s. 2.

home, and to which he intends to return, though he is absent as a sailor at sea at the time of his death (*k*).

No child under the age of sixteen, whether legitimate or illegitimate, residing in any parish with his or her father or mother, or stepfather or stepmother, or reputed father, shall be removed from such parish in any case where such father, mother, stepfather, stepmother or reputed father may not lawfully be removed from such parish (*l*).

Unemancipated children, how far irremovable.

Notwithstanding sect. 35 of the Divided Parishes Act, 1876, a child over sixteen who is residing with its parent as part of the family, and who has no other settlement than that derived from the parent at the time when it attained sixteen, is not removable to its place of settlement if the parent is not removable (*m*). And a child under sixteen, left an orphan, whose last surviving parent had acquired exemption from removal, shall be exempt from removal in like manner (*n*).

An unemancipated child, living with her father long enough in a parish to acquire irremovability, but whose mother was chargeable as a lunatic, and was removed to the parish of her settlement, while the father and child still continued to reside in the same parish till his death, a few months after which the child became chargeable, and then the mother died, is irremovable after the death of her mother (*o*). And now, by statute, where a child under the age of sixteen, residing with its surviving parent, shall be left an orphan, and such parent shall at the time of death have acquired an exemption from removal by reason of a continued residence, such orphan shall, if not otherwise irremovable, be exempt from removal, in like manner and to the same extent as if it had then acquired for itself an exemption from removal by residence (*p*).

Unemancipated children.

A married woman deserted by her husband, who shall, after his desertion, reside for one year in such a manner as would, if she were a widow, render her exempt from removal, shall not be liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her (*q*).

A married woman living separate from her husband on account of his cohabitation with another woman, and receiving from him a weekly allowance, which he gave in order to prevent legal proceedings against him, is deserted by him within the meaning of the above section (*r*).

Wife deserted by her husband.

Whenever any person shall have a wife or children, having

(*k*) *R. v. East Stonehouse (Inh.)* (1855), 24 L. J. M. C. 121.

(*l*) 9 & 10 Vict. c. 66, s. 3.

(*m*) *Mitford Union v. Wayland Union* (1890), 25 Q. B. D. 164.

(*n*) 24 & 25 Vict. c. 55, s. 2.

(*o*) *R. v. Elvet (Inh.)* (1859), 29 L. J. M. C. 17.

(*p*) 24 & 25 Vict. c. 55, s. 2.

(*q*) 24 & 25 Vict. c. 55, s. 3; 29 & 30 Vict. c. 113, s. 17.

(*r*) *R. v. St. Mary, Islington (Inh.)* (1870), L. R. 5 Q. B. 445.

no other settlement than his or her own, such wife and children shall be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the 9 & 10 Vict. c. 66, and shall not be removable from any parish or place from which he or she would not be removable by reason of any provision of the said Act(s). And accordingly, where a girl of nineteen, having no settlement of her own, or any other than that of her mother, resided for two years in domestic service out of the union in which her mother was settled, and then became chargeable, she was held removable from the union where she had so resided to the union of her mother's settlement (*t*).

Irremovability of wife or children.

This provision operates to make a wife or children irremovable only where the husband is irremovable; therefore, where a private in the marines was quartered in barracks for the time required to make him irremovable, and his wife and children resided during that time in the same parish, and then became chargeable to it, it was held that they were not irremovable(*u*). So the widow of a sailor serving his Majesty and dying at sea is removable, as her husband comes under the proviso in sect. 1 of 9 & 10 Vict. c. 66; but she is irremovable for twelve months after his death, under sect. 2 of the same Act(*x*). And the wife does not acquire irremovability by the mere fact of the husband having become irremovable if his status is lost, as by his death, but she must also have resided a sufficient time. So that where, at the time of her husband's death, he being then irremovable, the wife had not resided the requisite time, she was, after his death, held to be removable, subject to sect. 2 of 9 & 10 Vict. c. 66(*y*).

Residence as a widow.

It is submitted that residence as widow will still coalesce with residence as wife to complete the time required for irremovability(*z*), but not to acquire a settlement(*a*).

But where a woman, having acquired by residence a status of irremovability, married a foreign sailor who had no settlement in England, and after they had lived together a few days he left and went to sea, and during his absence at sea she became chargeable, and upon his return from sea he came to her and found an order made for her removal to her maiden settlement, it was held that she could not be removed, and the order was quashed(*b*).

(s) 11 & 12 Vict. c. 111, s. 1.

(t) *R. v. Guardians of St. Olave's Union* (1873), L. R. 9 Q. B. 38; *West Ham Union v. St. Mathew's, Bethnal Green*, [1894] A. C. 230.

(u) *R. v. East Stonehouse (Inh.)* (1854), 23 L. J. M. C. 137.

(x) *R. v. East Stonehouse (Inh.)* (1855), 24 L. J. M. C. 121.

(y) *R. v. Cudham* (1859), 28 L. J. M. C. 105.

(z) *R. v. Glossop* (1848), 17 L. J. M. C. 171.

(a) *Medway Union v. Bedminster Union* (1889), 14 A. C. 465; and see p. 701.

(b) *R. v. St. George's-in-the-East* (1870), L. R. 5 Q. B. 364.

As to what constitutes a parish, see 9 & 10 Vict. c. 66, s. 8, and 4 & 5 Will. 4, c. 76, s. 109, and a parish under local Acts (*c*).

SECTION 4.

OF THE TRIAL AND DETERMINATION OF APPEALS AGAINST ORDERS OF REMOVAL; AND HEREIN OF AMENDMENTS BY THE SESSIONS.

The first step on the hearing of appeals against orders of removal is to prove the service of the notice of appeal, and of the statements of the grounds of appeal by the appellants; unless they are admitted. The appellants should then produce the original order, if it has been served on them, unless it is already filed at the sessions (*d*); or, if a copy only has been served on them, they should have given notice to the officers of the removing parish (and also perhaps to the pauper) to produce the original order at the hearing, in which case they may produce and prove their copy at the sessions (*e*); but where the practice of the court required the production of the original order, and the appellants had omitted to give the respondents notice to produce it, the sessions dismissed the appeal, and were upheld upon motion for a mandamus (*f*). The order or its copy is then read; and any preliminary objections may be taken to its form. In the latter event it is enacted (*g*) that upon the hearing of any appeal against an order of removal no objection whatever on account of any defect in the form of setting forth any ground of removal, or of appeal in any such statement shall be allowed, and no objection to the reception of legal evidence offered in support of a ground of removal or appeal alleged to be set forth in any such statement shall prevail, unless the court shall be of opinion that such alleged ground is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement, and to prepare for trial: provided always, that in all cases where the court shall be of opinion that any such objection to such statement, or to the reception of evidence, ought to prevail, it shall be lawful for such court, if it shall so think

Amendment
of orders of
removal.

(*c*) *R. v. Ferncett St. Mary* (1849), 18 L. J. M. C. 125.

(*d*) See *ante*, p. 453.

(*e*) *R. v. Kirkby Stephen* (1770), Burr. S. C. 664.

(*f*) *R. v. Justices of Peterborough* (1849), 18 L. J. M. C. 79.

(*g*) 11 & 12 Vict. c. 31, s. 4.

fit, to cause any such statement of grounds of removal or appeal to be forthwith amended by some officer of the court or otherwise on such terms as to payment of costs to the other party, or postponing the trial to another day in the same sessions, or to the next subsequent sessions, or both payment of costs and postponement, as to such court shall appear just and reasonable.

Formerly, by sect. 6 of 11 & 12 Vict. c. 31, and now by 12 & 13 Vict. c. 45, s. 7 (Baines's Act), it is enacted that if upon the trial of any appeal to any court of general or quarter sessions against any order or judgment made by any justice of the peace, or upon the return to a writ of *certiorari*, any objection shall be made on account of any omission or mistake in the drawing up of such order, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the magistrates making such order to have authorised the drawing up thereof free from the said omission or mistake, it shall be lawful for the court upon such terms as to payment of costs as it shall think fit, to amend such order or judgment, and to adjudicate thereupon as if no such omission or mistake had existed: provided always, that no objection on account of any omission or mistake in an order of removal brought up upon a return to a writ of *certiorari* shall be allowed unless such omission or mistake shall have been specified in the rule for issuing such writ of *certiorari*.

The object which the sessions should have in view in acting upon this statute should be, that if it appears that the pauper has been removed to his proper parish they should correct all defects in the order, so far as the language of the statute enables them to do.

Defects which formerly were fatal to the order are now amendable under the statute; thus, an order stating a complaint to have been made to two of her Majesty's justices of the peace for a borough was held bad, as not showing that the complaint was made to them within their jurisdiction (*h*); but this would now be amendable by inserting the words "in and" before "for" the borough (*i*), inasmuch as an order in that form has been held sufficient (*k*).

Since 4 & 5 Will. 4, c. 76, s. 81, the sessions cannot on appeal enter into any objection to an order of removal for defects on the face of it, whether of form or substance, which are not stated in the notice of the grounds of appeal. The appellant is confined strictly to the grounds of objection stated in his notice of appeal. Thus, where an order of removal omitted to state the names and ages of certain children, and such omission was not stated as a ground of appeal, the

Omissions or mistakes in drawing up order may be rectified.

Defects amendable.

(*h*) *R. v. Stockton-on-Tees* (1845), 14 L. J. M. C. 128.

(*i*) *R. v. Hellingley* (1859), 28 L. J. M. C. 167.

(*k*) *R. v. Newton Ferrers* (1846), 9 Q. B. 32.

appellants on the hearing were precluded from objecting to the validity of the order on that ground (*l*).

No settlement can be relied on by the respondents, except it is stated in the grounds of removal (*m*). However, the statute does not preclude them from calling witnesses who were not examined before the removing magistrates, or bind them to call all those who were; and it is sufficient if they make out a *prima facie* case at the sessions (*n*).

Matters which may be proved on hearing of the appeal.

Respondents may perhaps support their order on grounds not disclosed in the depositions, provided the settlement relied on be still in substance the same as is mentioned in the grounds of removal (*o*). But where they sought to give in evidence other facts, not indeed inconsistent with those before stated, but facts which appellants had no opportunity of inquiring into or reason to believe true (*e.g.*, that the person stated in the examination to have hired the pauper, acted in that transaction not for himself, but for his father, whose name had not before appeared), the court held that, as both parties had come to the sessions to try such questions as arose on the pauper's examination, the respondents were not at liberty to introduce new facts which the appellants, if apprised of them before, might have thought true, and therefore might have forborne appealing, or might have deemed false, and prepared themselves to dispute (*p*).

If more than one settlement is set up by the respondent in the grounds of removal, or by the appellants in the grounds of appeal, the incomplete statement of one will not preclude the removing parish as respondents or the appellants from establishing any other which is sufficiently stated (*q*), though prior in point of date (*r*); and respondents may at the sessions confine themselves to proving any one settlement disclosed in the grounds of removal without relieving appellants from proving any fact, also averred there, which the appellants may be desirous to use in support of their own case; and statements of this kind in examinations are not to be treated as admissions (*s*), but these cases were decided before 11 & 12 Vict. c. 31, s. 2, which makes it incumbent upon the respon-

(*l*) *R. v. Withernwick (Inh.)* (1837), 6 A. & E. 273; and see *R. v. Whitley Upper* (1839), 11 A. & E. 90.

(*m*) *R. v. Lydeard St. Lawrence (Inh.)* (1841), 11 A. & E. 616.

(*n*) *R. v. Yelvertoft (Inh.)* (1845), 1 New Sess. C. 476.

(*o*) *Arguendo in R. v. Misterton* (1837), 6 A. & E. 878.

(*p*) *R. v. Misterton (Inh.)*, *sup.*; cited *R. v. Justices of Derbyshire* (1837), *id.* 891.

(*q*) *R. v. Justices of Carnarvonshire* (1841), 2 Q. B. 325 (not overruled *quod hoc*); *R. v. Camrose (Inh.)* (1843), 2 Q. B. 330, n.

(*r*) Thus proof of a binding apprentice may be abandoned by the removing parish, while a previous settlement, *e.g.*, by birth, may be relied on by them: *R. v. Latchford (Inh.)* (1844), 14 L. J. M. C. 20.

(*s*) *R. v. Latchford (Inh.)*, *sup.*; *R. v. Whitwick (Inh.)* (1844), 14 L. J. M. C. 25.

dents to state their grounds of removal, and the question of admissions is not now material.

Effect of order of removal unappealed against.

A previous order of removal, good on the face of it, executed and unappealed against, has the peculiar effect of being conclusive of the pauper's settlement at the time it bears date, not only between the parties originally concerned, but as against all the world, though *res inter alios acta*; thus it binds a third parish on a subsequent appeal (*t*); but a pauper may acquire a fresh settlement subsequent to the order (*u*).

An order unappealed against is conclusive as to facts stated in the order and material to it; thus, of the marriage of parties removed by it, and therein described as man and wife (*x*); also of the legitimacy of the children whom it names (*y*); of the settlement of after-born children of the marriage so established (*z*); of the settlement of the husband when it removes the wife by name, though not describing her as such (*a*); and even when it removes his wife as a widow under the supposition of his death, for it is presumed that she was removed to the place of his settlement (*b*). But it is not conclusive as to a son who is not named in the order, and did not at the time form part of his father's family, being emancipated (*c*), unless it can be shown that he has not acquired any fresh settlement since the emancipation (*d*); but emancipation must not be presumed in the absence of proof (*e*). Its effect between several townships of a parish after separation of a township is a difficult question (*f*).

Effect of an order of removal confirmed on appeal.

Judgments of courts of competent jurisdiction directly on the point in question are, as evidence, conclusive between the same parties upon the matter directly in question in another suit. Upon this principle, a judgment of a court of sessions confirming an order of removal, is conclusive not only against the parish to which the removal is directed to be made, but (being a judgment *in rem*) against all the world (*e.g.*, as between the appellant parish and a third parish on a subsequent appeal), that the pauper, at the time when that order was made, was settled in the parish to which he was so sent (*g*).

(*t*) *R. v. Corsham* (1809), 11 East, 388; *R. v. Kenilworth* (1788), 2 T. R. 599.

(*u*) *R. v. Fillongley* (1788), 2 T. R. 709.

(*x*) *R. v. Wood Chester* (1742), Burr. S. C. 191; *R. v. Silchester* (1765), Burr. S. C. 551; and cases collected in *R. v. Wye (Inh.)* (1838), 7 A. & E. 763.

(*y*) *R. v. Northfeatherston* (1731), 1 Sess. Cas. 170.

(*z*) *R. v. St. Mary, Lambeth* (1796), 6 T. R. 615.

(*a*) *R. v. Towcester* (1785), Cald. 497.

(*b*) *R. v. Rudgeley* (1800), 8 T. R. 620.

(*c*) *R. v. Southowram* (1786), 1 T. R. 353.

(*d*) *R. v. Cutterall* (1817), 6 M. & S. 33.

(*e*) *R. v. Yewceley (Inh.)* (1838), 8 A. & E. 806; *R. v. Sow (Inh.)* (1843), 12 L. J. M. C. 38.

(*f*) *Per cur. R. v. Oldbury* (1835), 4 A. & E. 167.

(*g*) *R. v. Wick St. Lawrence* (1833), 5 B. & Ad. 533; *per Coleridge, J., R. v. Clint* (1841), 10 L. J. M. C. 151; *R. v. Knaptoft* (1824), 2 B. & C. 883; *R. v. Eremcoo and Barony* (1843), 12 L. J. M. C. 10; commented

Parol evidence of the grounds of an order of sessions made quashing an order of removal generally, *i.e.*, without special entry, is admissible (*h*).

An order of sessions quashing an order of removal generally (*i.e.*, not for mere defect of form and without special entry) is conclusive between the contending parishes (*i*) as to the point which it decides; that point being that, at the time when the order was made, the appellant parish was not bound to receive the pauper (*k*); but as to any collateral issue taken on the hearing it is not evidence (*l*).

Since 4 & 5 Will 4, c. 76, a more extensive range is given to the conclusive effect of an order of sessions, when a subsequent question arises between the same parishes. Thus, where two orders of removal had been quashed on appeal, one for variance between the examination on which the removing justices proceeded, and the proof at the hearing of the appeal in a material date laid in the former (*m*); and the other for omitting the date of the birth of the pauper's husband, through whom a settlement was derived (*n*), the sessions having thought the variance and omission material, the Court of Queen's Bench held their decisions not of form merely, but conclusive between the same parishes in appeals against subsequent removals made on amended examinations; and see 11 & 12 Vict. c. 31, and 12 & 13 Vict. c. 45, giving powers of amendment. See *ante*, pp. 705, 706.

If it can be shown that an order of quarter sessions for quashing an order of removal turned on a particular point not being stated in the examinations, or, if so stated, not being proved (*e.g.*, that the pauper, at the time of the order made, was not actually chargeable to the removing parish), and new matter (*e.g.*, actual chargeability, has since arisen) (*o*), the former order of sessions is not conclusive as to such fresh ground of removal (*p*), having proved nothing as to the question of settlement (*q*); so that a fresh order of removal made after the new state of things, *viz.*, chargeability, existed, was held not prejudiced by the order of sessions made before.

Effect of order of removal quashed on appeal generally (*i.e.*, without special entry), and not for mere defect of form.

Effect of quashing orders of removal.

on by Patteson, J., in *Ex parte Overseers of Ackworth* (1843), 13 L. J. M. C. 38.

(*h*) *R. v. Wick St. Lawrence*, *sup.*; *R. v. Charlbury and Walcott* (1843), 13 L. J. M. C. 19; *R. v. Perranzabulo* (*Inh.*) (1844), 13 L. J. M. C. 47.

(*i*) *R. v. Bradenham* (1756), Burr. S. C. 394; *R. v. Clint* (*Inh.*), *sup.*

(*k*) *Per James Parke, J., R. v. Wick St. Lawrence*, *sup.*

(*l*) *R. v. Knaptoft*, *sup.*; *R. v. Wick St. Lawrence*, *sup.*

(*m*) *R. v. Clint* (*Inh.*), *sup.*

(*n*) *R. v. Charlbury and Walcott* (*Inh.*), *sup.* This case shows that where the examination omits some material facts, it is the same thing as if on the hearing of the appeal the parties had not brought evidence of such facts before the court: see *per* Patteson, J.

(*o*) *R. v. Wheelock* (1826), 5 B. & C. 511.

(*p*) See *per* Patteson, J., in *R. v. Charlbury and Walcott* (*Inh.*), *sup.*

(*q*) *R. v. Perranzabulo* (*Inh.*), *sup.*

But as between the removing parish, whose order of removal is quashed by the sessions, and any third parish, the order of sessions is only conclusive as to the parish which succeeded on that appeal; and the first parish may remove again to any third parish, not party to the former removal (*r*). Nor does it prevent a third parish to which the unsuccessful respondent afterwards removes the pauper from appealing and proving a settlement in the parish, which, as appellant, quashed the order on the first appeal (*s*); for such quashing ascertains nothing affirmatively with regard to the appellant parish; and so far from proving that the settlement ever has been there, it finds the negative, viz., that at a given time the pauper was not settled in the appellant parish (*t*).

Where order
quashed not
on the merits.

If an order of removal is quashed not on the merits but for the special ground of a defect in form, or because the pauper was not actually chargeable or resident for forty days, or was irremovable (and this appears as it ought to do by special entry on the face of the order of sessions (*u*), in order to save the expense of calling witnesses on trying a second appeal), the order of sessions of course concludes nothing except the point contained in the special entry. But see as to formal defects 11 & 12 Vict. c. 31, and 12 & 13 Vict. c. 45.

It has been said that where an order is quashed generally on the motion of the respondents, with the consent of the appellants, and merely because respondents decline going into their case, that is a decision on the merits (*x*), and conclusive.

Where an order of removal is appealed against, and quashed generally by the sessions, a mandamus will not be granted to compel the sessions to make a special entry on their proceedings of the particular ground on which the order was quashed, but the respondents may on the trial of another appeal explain by evidence the particular ground on which the former order was quashed (*y*).

Production of
paupers for
examination.

In case the pauper has been actually removed to the appellant parish before the hearing, the appellants, if served in due time with the usual notice to produce him, ought now either to produce him, or to show that his absence is not occasioned by their connivance or default. But when he has not been removed, or where his evidence is required to sustain

(*r*) *St. Michael's, Bedenham, and Kingston Bowsey* (1698), Salk. 486; see *id.* 525.

(*s*) *R. v. Bentley* (1757), Burr. S. C. 425; *R. v. Knaptoft* (1824), 2 B. & C. 883.

(*t*) *R. v. Cirencester* (1734), Burr. S. C. 17.

(*u*) See *R. v. Wick St. Lawrence* (1833), 5 B. & Ad. 539, *per* Patteson, J.

(*x*) *R. v. Church Knowle (Inh.)* (1837), 7 A. & E. 471, *per* Coleridge, J. This may be otherwise, if the respondents secure the appellants from being misled, by acquainting them precisely with the ground on which they withdraw the order: *per* Lord Denman, S. C. at p. 479.

(*y*) *R. v. Wheclock* (1826), 5 B. & C. 511.

the order, it is safer to subpoena him as a witness. If he does not appear, and the appellants show that he has absconded, the court will respite the appeal to the next sessions, directing the appellants in the meantime to make diligent search after him. If after actual removal to the appellant parish he be not forthcoming, the sessions will sometimes confirm the order, considering it to be the duty of the appellants to bring him; but even if he has been removed in fact, this seems doubtful, for the appellants have not the custody of his person, and the respondents, knowing that they must support their order, ought to have subpoenaed him as a witness.

In general, the *ex parte* examination of a pauper touching his settlement, though committed to writing and taken before two justices, is not admissible evidence on an appeal of such settlement (z). Nor is the statement as to place of birth contained in the attestation paper of a soldier *prima facie* evidence of settlement, notwithstanding sect. 163 of the Army Act, 1881 (44 & 45 Vict. c. 58)(a).

Examination of paupers as to settlement—soldiers.

And by 59 Geo. 3, c. 12, s. 28, it shall be lawful for any justice of the peace to take in writing the examination on oath of any person having a wife or child, who shall be a prisoner in any gaol or house of correction, or in the custody of any constable under a warrant of commitment, touching his or her last settlement, and such examination signed by such justice shall be received in evidence as to such settlement before any justices, so long only as the person examined shall continue a prisoner.

Examination of a prisoner.

A certificate by a board of guardians or district board, in the form of the schedule given in 7 & 8 Vict. c. 101, to the effect that A. B. and C. D. became chargeable on a certain day to a certain parish in the union purporting to be signed by the presiding chairman of such guardians or district board, and to be sealed with their seal, and to be countersigned by their clerk, shall, unless the contrary be shown, be taken to be sufficient proof of the truth of all the statements contained in such certificate, and shall be received in evidence accordingly by and before all courts of justice and all justices, without any proof of the signatures or official character of the persons signing the same, or of such seal; and for the purpose of making an order of removal or other order, no further or other evidence of chargeability than such certificate shall be required, provided that every such order bear date within twenty-one days next after the date of such certificate (b);

Evidence of chargeability.

(z) *R. v. Ferry Frystone or Ferrybridge* (1801), 2 East, 54; *R. v. Nuneham Courtney* (1801), 1 East, 373.

(a) *Chertsey Union v. Surrey Clerk of the Peace* (1893), 69 L. T. 384.

(b) 7 & 8 Vict. c. 101, s. 69; and see *R. v. Bickington (Inh.)* (1846), 15 L. J. M. C. 157.

Evidence of chargeability. and such certificate shall be received within the space of twenty-one days from the date thereof in all courts, and before any justice or justices, and for all purposes as sufficient evidence of the chargeability of the person named therein, unless the contrary be shown (*c*); and by the above statute, 7 & 8 Vict. c. 101, s. 69, every copy of a minute, order, complaint, claim, application, or authority of a board of guardians or district board similarly authenticated, is made evidence in a similar manner.

Right to begin, and reply.

If the issue on the appeal be the settlement of the pauper in the appellant parish, the affirmative of the issue lies on the respondents, by showing the pauper to be settled in the parish to which the removal was made (*d*); and their leading counsel having opened his case to the bench, he with his junior calls the witnesses, subject to the ordinary rules of evidence.

When the appellant begins.

But if the appellants admit the settlement but allege by way of confession and avoidance a subsequently-acquired settlement, or set up the pauper's irremovability from the respondent parish, it would seem (as the onus of giving evidence is thrown on the appellant) that they should begin; and if the respondents do not call rebutting evidence, should sum up their evidence, and the respondents would then reply; but if in such a case the respondents called rebutting evidence, the appellants would then have the right of reply.

If the respondents begin to make out a *prima facie* case (*e.g.*, a woman's maiden settlement without anything to show that any subsequent settlement which would supersede it has been gained), or if it is admitted, and appellants begin, it is enough for them to disprove their obligation to maintain the pauper by showing him not settled in their parish, without proving the precise place of his settlement (*e*).

If the pauper is called for the respondents, the appellants' counsel may of course cross-examine him generally; but though the appellants will succeed if they can show the pauper to be settled in any other parish than their own, it is the more convenient course, and the practice of some sessions, not to allow the appellants to prove a subsequent settlement on such cross-examination; but, in case they rely on his evidence to prove a subsequent settlement, to require them to open their own case and call him again as their witness. If the respondents' counsel begins he has, as we have seen, the general reply, if witnesses are called or evidence opened by the advocate for the appellants; but otherwise the case closes with the address of the latter. If the respondents' counsel in his reply cites fresh cases, some courts of quarter session permit the opposite counsel to observe on them.

Right of reply.

(*c*) 11 & 12 Vict. c. 110, s. 11.

(*d*) *R. v. St. Mary, Beverley (Inh.)* (1830), 1 B. & Ad. 201.

(*e*) *Ibid.* 1 B. & Ad. 205.

Though the only settlement which can be supported on either side must be that which is stated in the grounds of removal or statement of grounds of appeal, it may be supported by any number of witnesses or amount of documentary evidence which either party may think fit to adduce (*f*); nor are the respondents bound to call the witnesses examined before the justices, or to rest content with their testimony if called.

If two appeals are entered against one order, and it is quashed on one of them, the other should not be tried (*g*).

The justices are not only the sole judges of the effect of evidence adduced on appeals, but of its admissibility: no bill of exceptions lies against their determination on any point which may arise in the course of the trial (*h*); and if they should reject evidence on a misapprehension of the practice of their own court, or on a mistaken view of a rule of law, without sending up a case to the court above, the latter court will not interpose by mandamus to direct a review of their decision (*i*). For that would be in fact to grant a new trial, which the court above has not jurisdiction to do (*k*). But if they hear one side, and altogether refuse to hear the other, it seems a mandamus may issue as if the case had not been heard at all (*l*). See on this subject more fully, *ante*, p. 514 *et seq.*

Judicial power of Justices.

Improper rejection of evidence.

As to the adjournment of appeals, see *ante*, p. 455. After an appeal against an order of removal has been entered upon, the court has power to adjourn the hearing to the following sessions (*m*), and fresh grounds of appeal may be served (*n*).

The only legal judgment which can be pronounced is simply, that the order be confirmed or quashed, and may be given or altered at any time during the same session, or, as it seems, by the same justices, at an adjournment of it (*o*). But they cannot supersede or suspend it, and make or add an original order of their own; *e.g.*, for removing the pauper back to the

Judgment to confirm or quash the order of removal.

(*f*) See *R. v. Ruyton of the Eleven Towns (Inh.)* (1861), 30 L. J. M. C. 229.

(*g*) *R. v. Justices of Westmoreland* (1843), 12 L. J. M. C. 116.

(*h*) *Ante*, p. 465.

(*i*) *R. v. Justices of Carnarvonshire* (1820), 4 B. & A. 86, stated *ante*, p. 516; *Ex parte Pratt* (1837), 7 A. & E. 27, a case of the strongest kind, for the appeal was against a conviction on the Game Trespass Act (1 & 2 Geo. 4, c. 32), which takes away a *certiorari*: see *R. v. Justices of Ripon* (1837), 7 A. & E. 417; and *per* Lord Denman in *R. v. Justices of Cheshire* (1838), 8 A. & E. 400.

(*k*) *R. v. Justices of Kesteven* (1844), 13 L. J. M. C. 38; *Ex parte Pratt, sup.*

(*l*) *R. v. Justices of Carnarvonshire, sup.*; *per* Holroyd, J.; and see *R. v. Justices of Cumberland* (1836), 4 A. & E. 695.

(*m*) *R. v. Cambridge Union* (1861), 30 L. J. M. C. 137.

(*n*) *R. v. Kendal* (1859), 28 L. J. M. C. 110.

(*o*) See *ante*, p. 481.

respondent parish (*p*), or to any other parish (*q*). But where they quash an order of removal for form only, a special entry should be made accordingly (*r*). It has been ruled that a judgment for quashing an order, if so entered by mistake for any other order pronounced by the justices, can only be corrected at the same sessions, or at an adjournment of them (*s*); for the King's Bench, not being a court of error from that court, will not correct its judgment, though it may compel it by mandamus to arrive at one by hearing and deciding on an appeal (*t*).

The rules of proceeding on appeals against orders of removal, on collecting the votes and on pronouncing the judgment, are similar to those in other cases of appeal.

Costs of
appeal.

The question of costs on these appeals has been considered generally (*u*). The special enactments with respect to costs of appeals against orders of removal are to be found in 8 & 9 Will. 3, c. 30, s. 3, by which, upon any appeal before the quarter sessions concerning the settlement of any poor person, or upon any proof before them there to be made, of notice of any such appeal to have been given by the proper officer to the churchwardens or overseers of the poor of any parish or place, though they did not afterwards prosecute such appeal, the justices shall at the same quarter sessions order to the party in whose behalf such appeal shall have been determined, or to whom such notice shall appear to have been given as aforesaid, such costs and charges in the law as in their discretion shall be thought most reasonable to be paid by the churchwardens, overseers or any other person against whom such appeal shall be determined. And by 4 & 5 Will. 4, c. 76, s. 82, upon every such appeal the court before whom the same shall be brought shall and may, if they think fit, order and direct the parish against which the same shall be decided to pay to the other such costs and charges as may to such court appear reasonable, and shall certify the amount thereof. And by 11 & 12 Vict. c. 31, s. 5, parties making frivolous or vexatious statements of grounds of removal or appeal are liable to pay the costs (*x*). As to abandoned appeals, see p. 477.

The sessions cannot give the costs of the day on a mere adjournment, though they may make their payment a condition of the adjournment (*y*).

(*p*) *R. v. Milverton* (1702), 7 Mod. 10; and cases collected in *R. v. Bond* (1686), 2 Shower, 503.

(*q*) *R. v. Oswell and Woking* (1696), Salk. 472.

(*r*) *Ante*, p. 466.

(*s*) *R. v. Justices of Leicestershire* (1813), 1 M. & S. 442.

(*t*) *R. v. Justices of Monmouthshire* (1825), 4 B. & C. 844; *R. v. Justices of Monmouthshire* (1828), 8 B. & C. 137.

(*u*) *Ante*, p. 472 *et seq.*

(*x*) See also 12 & 13 Vict. c. 45, s. 4, *ante*, p. 476.

(*y*) *R. v. Justices of Monmouthshire* (1831), 1 B. & Ad. 895; *R. v. Stansfield* (1742), Burr. S. C. 205.

CHAPTER VI.

OF ORDERS OF MAINTENANCE AND SETTLEMENT OF LUNATIC
PAUPERS.

THE law with reference to pauper lunatics is now consolidated, and is contained in the Lunacy Act, 1890 (53 Vict. c. 5), as amended by the Lunacy Act, 1891 (54 & 55 Vict. c. 65).

The right to appeal in certain cases is conferred by sects. 301 and 303, and the procedure in such appeals is laid down in sects. 302 and 304 to 313 of the Act of 1890.

By sect. 313 the provisions of sect. 31 of the Summary Jurisdiction Act, 1879, shall not apply to appeals under the above-mentioned sections.

By sect. 301 (1) any person aggrieved by the refusal of an order by any justice or justices as to any matters within the jurisdiction of a justice or justices under this part of this Act, may appeal to a court of quarter sessions upon giving the justice or justices against whom the appeal is made fourteen clear days' notice of appeal. Such days must be exclusive both of the day of serving the notice and the day of holding the sessions^(a). Who may appeal.

By sect. 303 if the guardians of any union feel aggrieved by any order adjudging the settlement of a lunatic, they may appeal to the quarter sessions for the county or borough on behalf of which the order has been obtained, or in which the union obtaining the order is situate, or in case such union extends into several counties, then to the next quarter sessions for the county or borough in which the institution for lunatics where the lunatic is or has been confined is situate, and such sessions upon hearing the appeal shall have full power to determine the matter.

The orders mentioned in sect. 301 as orders "under this part of the Act" are orders made under sects. 283 to 298 inclusive. The sections refer to the chargeability and maintenance of pauper lunatics, and the necessary orders by justices upon guardians of unions for payment of expenses.

The right of appeal given by sect. 301 to any person aggrieved is limited by sect. 303 in the case of an order

(a) *R. v. Justices of Herefordshire* (1820), 3 B. & Ald. 581.

adjudging the settlement of a lunatic to appeals by guardians only.

An order of adjudication may be obtained either by the local authority to whom a pauper lunatic is adjudged chargeable (*b*), or by the guardians of the union to which the lunatic has been adjudged chargeable (*c*). No appeal lies against an order of maintenance only (*d*).

Appeal to
what sessions.

The court of quarter sessions to which the appeal lies must be ascertained from sect. 303. That section decides that the appeal is to the county sessions where the order has been obtained (1) on behalf of the county, *i.e.*, by the county council; (2) by the guardians of a union situate wholly in the county; (3) by the guardians of a union extending into several counties, provided the asylum is not situate in a borough having a separate court of quarter sessions.

And the appeal is to the borough sessions where the order has been obtained (1) on behalf of a local authority other than the county council or the common council of the city of London (*e*); (2) by the guardians of a union situate in a borough having a separate court of quarter sessions; (3) by the guardians of a union extending to several counties where the asylum in which the lunatic is or has been situate is situate in a borough having a separate court of quarter sessions.

In the case of a union situate in several counties, and the asylum being either within or without a borough having a separate court of quarter sessions (*f*), it is to be noticed that the appeal must be to the next quarter sessions—in any other case no restriction as to the next quarter sessions is imposed.

By sect. 302, where an order has been obtained adjudging the settlement of any lunatic to be in any union, the guardians of any union, or the clerk of the local authority, obtaining the order, shall send to the guardians of the union in which the lunatic is adjudged to be settled, a copy of the order, and (*inter alia*) a statement setting forth the grounds of adjudication, including the particulars of any settlement relied on in support thereof, and on the hearing of any appeal against the order the respondents shall not give evidence of any other grounds in support of the order than those set forth in such statement; but under sect. 307 the court has power to amend the statement.

Depositions.

By sect. 304, sub-sect. (1), the depositions in which is made an order adjudging the settlement of a lunatic are to be kept, and the party authorised to appeal against the order shall have a copy within seven days after application. By sub-

(*b*) Sect. 290, sub-s. 4 of Lunacy Act, 1890.

(*c*) Sect. 289.

(*d*) Sect. 287, sub-s. 3.

(*e*) See sect. 240, Lunacy Act, 1890.

(*f*) Cases 3, above.

sect. 4, on the trial of the appeal no order shall be quashed or set aside either wholly or in part on the ground that the depositions do not furnish sufficient evidence to support, or that any matter therein contained or omitted raises an objection to the order or grounds on which the same was made. That the order was made on hearsay evidence is not a ground of objection (*g*).

By sect. 305, no appeal shall be allowed, unless notice in writing is sent to the party on whose application the order was obtained within twenty-one days after the sending of a copy of the order and such statement as aforesaid [as provided by sect. 302], unless within the twenty-one days a copy of the depositions has been applied for by the party appealing, in which case a further fourteen days is to be allowed for giving notice of appeal. The days are to be reckoned exclusive of the first day but inclusive of the last (*h*). Notice.

By sect. 306, where notice of appeal is given, the appellant shall, with the notice, or fourteen days at least before the first day of the sessions at which the appeal is to be tried, send to the respondent a signed statement in writing of the grounds of the appeal, and to those grounds he is restricted on the hearing. Grounds of appeal to be stated.

But by sect. 307, no objection shall be allowed at the hearing on account of any defect in the form of setting forth any ground of adjudication or appeal in any such statement, unless the court considers the alleged ground is so imperfectly or insufficiently set forth as to be insufficient to enable the party receiving the statement to inquire into the subject of such statement and to prepare for trial. And by sub-sect. 2 of that section the court may amend such statement, subject to such terms as to costs, &c. as to the court appears just.

By sect. 308, powers similar to those contained in 12 & 13 Vict. c. 45, s. 7, are given to the court to amend a mistake made in drawing up an order upon proof that sufficient grounds were before the justices to authorise the drawing up of the order free from mistake or omission, and as to objections taken upon the return to a writ of *certiorari*. Power to amend mistake in order.

By sect. 309, sub-sect. 1, the court may order the party against whom the appeal is decided to pay to the other such costs as to the court appears just, and shall certify the amount thereof. By sub-sect. 2, the court has power to award costs to the party meeting frivolous or vexatious grounds of appeal made by the other side. The order as to costs must be made by the court which has heard the appeal, and an order made by subsequent sessions is invalid (*i*).

(*g*) *R. v. St. Peter, Barton-on-Humber* (1851), 21 L. J. M. C. 23.

(*h*) *R. v. Justices of West Riding* (1833), 4 B. & Ad. 685; *Williams v. Burgess* (1840), 12 A. & E. 635.

(*i*) *R. v. Justices of Staffordshire* (1857), 26 L. J. M. C. 179.

Decision on
appeal to be
final.

By sect. 310, the decision of the court, upon the hearing of any appeal against any such order, as well upon the sufficiency and effect of the statement of the grounds in support of the order and appeal, and of the copy or duplicate of the order sent to the appellant, as upon the amending or refusing to amend the order as aforesaid, or the statement of grounds, shall be final, and shall not be liable to be reviewed in any court by means of a writ of *certiorari* or mandamus, or otherwise.

By sect. 311, the party obtaining the order may abandon it, whether notice of appeal has been given or not, and whether the appeal has been entered or not; and in all cases of abandonment the party abandoning shall pay costs to the appellant or the party entitled to appeal, such costs to be taxed by the proper officer of the court before whom the appeal might have been brought.

By sect. 312, in the case of an inquiry or appeal, access may be had to the lunatic to examine him as to the premises.

And by sect. 313, the provisions of sect. 31 of the Summary Jurisdiction Act, 1879, shall not apply to appeals under this part of the Act.

In case of wife
or children of
pauper irre-
movable by
reason of
residence.

The order for the expenses of the maintenance, &c. of the wife of a man who had a settlement in one parish, and was irremovable, by reason of his residence, in another, ought to be made upon the parish where he was resident and irremovable (*e*) (see sect. 294, Lunacy Act, 1890); but an order adjudicating the settlement, and for the maintenance of the wife of a man irremovable by reason of residence from the parish wherein he then resided, ought to be made on the parish of the husband's settlement, and not of his irremovability, where the wife had lived separated from the husband, and in a different parish, for some years (*f*). A legitimate child, whose parents have no settlement (the father being an Irishman, and the mother having no settlement), though unemancipated, has a settlement in the parish where it is born; and an order should be made under sect. 289, Lunacy Act, 1890, and not under sect. 290 of that Act (*g*).

The cost of the maintenance of a lunatic wife at the expense of the parish of the husband's residence is relief to the husband, and the period of such relief is to be deducted in computing the time of their residence in the parish for the purpose of inquiring into his irremovability (*h*).

As to un-
emancipated
lunatic chil-

The order in respect of a child above the age of sixteen, but unemancipated at the time of her removal to the asylum,

(*e*) *Leeds v. Wakefield* (1857), 26 L. J. M. C. 37.

(*f*) *R. v. Guardians of East Retford* (1862), 32 L. J. M. C. 17.

(*g*) *R. v. Newchurch (Ink.)* (1862), 32 L. J. M. C. 19.

(*h*) *R. v. Overseers of St. George, Bloomsbury* (1863), 32 L. J. M. C. 217; and see *ante*, p. 702.

who was removed from the workhouse of the parish from which her father was irremovable at the time of her entry into the workhouse, but who ceased to be irremovable between the time of the child's going into the workhouse and becoming lunatic, ought to be made on the parish of the father's settlement, and not of his residence, inasmuch as when he ceased to be irremovable from his parish of residence the child ceased also to be irremovable⁽ⁱ⁾; but in such a case, where the father was residing, and where he was irremovable at the time of the child being taken as a lunatic to the asylum, and removed afterwards, the former place continued to be liable to his maintenance, and not the place of the father's settlement^(k).

dren of pauper
irremovable
by reason of
residence.

So, where a father being irremovable from a parish by reason of residence dies, and his widow and unemancipated daughter continue to reside in the same parish till the daughter is sent into the workhouse, but whilst she is in the workhouse the widow leaves the parish of irremovability and goes to reside in another parish, and a month afterwards the daughter is sent from the workhouse to the county lunatic asylum, and three months later is discharged and sent to the widow; the widow then having no settlement, the order for maintenance was held to be rightly made on the parish of the father's settlement, as the widow had ceased, at the time of the daughter's removal to the asylum, to be irremovable from the parish of his residence, and the daughter had also ceased to be so as an unemancipated member of the widow's family^(l); but if the widow had continued to reside in the parish of her husband's residence, that parish would have had to bear the expense^(m).

And so, where the status of irremovability has been acquired by residence in a union by one who becomes lunatic, and was removed by her relations from her master's house to the residence of her parents in a different union, her wages being paid in full, and her master having no intention of receiving her back in his house, and after staying with her parents for a single night was sent to the workhouse of the second union, and was seven days afterwards taken to the county lunatic asylum; inasmuch as the lunatic was not capable of exercising the intention of abandoning her residence, she therefore did not cease to reside in the union of her irremovability, by reason of the changes of her place of residence prior to her removal in the union caused by her relatives⁽ⁿ⁾.

When lunatic
pauper has
acquired the
status of irre-
movability.

A woman, who was irremovable by reason of residence in

(i) *R. v. St. Ann, Blackfriars* (1853), 22 L. J. M. C. 137.

(k) *R. v. Overseers of St. Giles* (1860), 30 L. J. M. C. 12.

(l) *R. v. Overseers of St. Mary Arches, Exeter* (1862), 31 L. J. M. C. 77.

(m) *R. v. St. Mary, Islington* (1862), 31 L. J. M. C. 233; *R. v. Overseers of St. Giles, sup.*

(n) *R. v. Whitby Union* (1870), L. R. 5 Q. B. 325.

a union, took a place as domestic servant with a family residing in another union, upon the terms that she was to be a month on trial, and at the end of that time, if both parties agreed, she should continue in the service, terminable at a month's notice. She took all her clothes with her, but intended, in case she did not suit, to return to her mother's house, in which she had been previously residing. She received notice to leave at the end of a fortnight, and she returned to her mother accordingly, but her residence was held to be broken (*o*); and similarly a pauper who gave up his lodgings in a parish, and left intending to return when trade became better, and leaving some old clothes with his landlord, and returned after three months, his lodgings remaining vacant all the time, was held to have broken his residence (*p*).

Jurisdiction
of justices
making the
order.

The jurisdiction of the justices to adjudicate on the settlement and maintenance attaches on a pauper lunatic being found confined in an asylum, and the validity of their order is not affected by the fact that the order of admission was made by a justice having no jurisdiction to make it (*q*). So the recital of an insufficient order of admission to the asylum will not affect the validity of the order adjudicating the settlement (*r*).

Every pauper lunatic who is chargeable to a union shall, while he resides in an institution for lunatics, be deemed for the purposes of his settlement to be resident in the union to which he is chargeable (*s*).

By 24 & 25 Vict. c. 55, s. 6, a lunatic pauper previously chargeable to a parish is now chargeable to the union in which such parish is situate.

Power of
adjournment
of appeal.

The court of quarter sessions have power to adjourn the hearing of the appeal to the next sessions, under sect. 305 of the Act of 1890.

(*o*) *R. v. Glossop Union* (1866), L. R. 1 Q. B. 227.

(*p*) *R. v. Stourbridge Union* (1865), 34 L. J. M. C. 179.

(*q*) *R. v. Overseers of Faversham* (1862), 31 L. J. M. C. 116.

(*r*) *R. v. Crediton (Inh.)* (1858), 27 L. J. M. C. 265.

(*s*) Lunacy Act, 1890, s. 286.

CHAPTER VII.

OF APPEALS RELATING TO OVERSEERS—THEIR APPOINTMENT
AND ACCOUNTS.

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SECTION 1.

OF APPEALS AGAINST THE APPOINTMENT OF OVERSEERS.

THE court of quarter sessions has no original jurisdiction over the appointment of overseers of the poor, but has a jurisdiction by way of appeal, by 43 Eliz. c. 2, s. 6, and 17 Geo. 2, c. 38, s. 4, which give a right to “any person or persons *aggrieved*” by that appointment to appeal to the next general or quarter sessions whose jurisdiction extends over the place for which the appointment is made. The appointment of overseers of the poor is vested in the parish council in every rural parish where such council exists; where no parish council exists, then the parish meeting appoint. (Local Government Act, 1894 (56 & 57 Vict. c. 73), ss. 5, 19, 50.) As to urban districts, municipal boroughs, including county boroughs, see sect. 33, and the appeal exists equally whether the appointment has been made by justices or by the parish council or meeting. (56 & 57 Vict. c. 73, s. 52 (5).) The right of appeal is given not only to the appointee but the parishioners, who may appeal on any ground of unfitness in him, as his insolvency (*a*); and the sessions may make such order therein as they think convenient, the same to conclude and bind all parties. This appeal is the proper course where the party appointed overseer claims exemption on the ground of filling another office, which is not made incompatible by statute, but which, he contends, is so at common law; for till the decision of the sessions in his favour, the appointment is

Jurisdiction
of quarter
sessions.

(*a*) *R. v. Forrest* (1789), 3 T. R. 38; and see *R. v. Justices of St. Albans* (1825), 3 B. & C. 698.

valid, and he is legal overseer *de facto* (*b*); and so if the objection of the appointee be that he is not a householder, it is a matter of appeal, and a *certiorari* will not be granted to remove the appointment for the purpose of quashing it on that ground (*c*). No person is qualified to be appointed an overseer who at the time of the proposed appointment shall be an assistant overseer of any parish, and no overseer can be appointed an assistant overseer (*d*).

Who may not be overseer.

To what session the appeal is to be made.

The appeal should be made to the next practicable quarter sessions during the year of office; but 43 Eliz. c. 2, s. 6, fixes no time within which it is to be brought, and does not seem affected by 17 Geo. 2, c. 38, as to this appeal against the original appointment of overseers.

Notice or ground of appeal.

Nor does the Act of Elizabeth make any notice of appeal or statement of the grounds of it necessary; but such reasonable notice must be given to the appointing council within the time fixed by the practice of the particular sessions as to other appeals; but the procedure is now governed by Baines's Act (12 & 13 Vict. c. 45), and the provisions of that Act requiring fourteen days' notice and grounds of appeal must now be considered as applicable.

Trial of the appeal.

By 54 Geo. 3, c. 91, the appointment "shall be made" on the 25th of March, or within fourteen days next after such day; but it has been held that this is only directory, and therefore an appointment made at a petty sessions held by adjournment after the fourteen days had expired was good (*e*). In determining the appeal, the sessions have a right to exercise the same latitude of discretion in judging who are fit to be nominated, as the parish council had in making the original order.

By the 43 Eliz. c. 2, s. 1, the overseers are to be four, three, or two substantial householders of the parish; and, therefore, to be liable to serve such office, the person nominated must occupy as tenant of his premises, and not as servant, and if he occupy as servant only, his appointment is bad, as was held on a case stated by the sessions (*f*); and the appointment of one overseer only, though there was but one substantial householder in the parish, was held bad (*g*); but now, if two overseers cannot be conveniently appointed from the inhabitant householders, one may be appointed; and if there is not one capable of being appointed, then an inhabitant householder of an adjoining parish willing to serve, with or without salary, to be

(*b*) *Per Coleridge, J., R. v. Justices of Cheshire* (1840), 8 D. P. C. 616. Case of a registrar of births, &c. claiming exemption from office of overseer.

(*c*) *R. v. Justices of Pudding Norton* (1864), 33 L. J. M. C. 136; but see *R. v. Cousins* (1864), 33 L. J. M. C. 87.

(*d*) 29 & 30 Vict. c. 113, s. 10.

(*e*) *R. v. Sneyd* (1841), 5 Jur. 962.

(*f*) *R. v. Spurrell* (1865), L. R. 1 Q. B. 72.

(*g*) *R. v. Cousins*, *sup.*

paid out of the poor rate, may be appointed, and such appointment shall endure till the usual appointment of overseers, and may be renewed from year to year so long as may be necessary (*h*). The same person may hold jointly the office of churchwarden and overseer (*i*).

The quarter sessions are not bound to assign any reason for their decision; but if they assign reasons on the face of the order which are entirely insufficient in law, it will be quashed on its removal by *certiorari* (*k*).

The mode of trial is governed by the same rules as prevail in appeals against rates, and the appointment in question is either quashed or confirmed by the judgment. The sessions, it is presumed, have the powers over costs provided by sect. 5 of Baines's Act (12 & 13 Vict. c. 45). Costs of appeal.

SECTION 2.

OF APPEALS RELATING TO THE ACCOUNTS OF OVERSEERS.

Nothing in the orders of the poor law commissioners or in the Poor Law Amendment Act (4 & 5 Will. 4), respecting auditing parish accounts (*l*), takes away the ultimate power of two justices in special sessions, under 50 Geo. 3, c. 49, s. 1, to allow, in the general account submitted to them under that Act, items which had been disallowed by the auditor appointed by the guardians of a union (*m*), or to disallow items allowed by him (*n*). However, by 7 & 8 Vict. c. 101, s. 37, in every district for which an auditor may be appointed under that Act the powers of justices of the peace, and of all other persons, to examine, audit, allow or disallow accounts shall, as far as relates to any accounts which such auditor is authorized to examine and audit, cease and be repealed.

By this section it appears that the powers of justices as to accounts given them by 43 Eliz. c. 2, s. 1; 17 Geo. 2, c. 38, s. 1; 49 Geo. 3, c. 50, s. 1; and 50 Geo. 3, c. 49, are no longer subsisting, and the right to appeal to quarter sessions from such decisions is consequently lost also.

An appeal against any allowance, disallowance, or surcharge by any such order by any person aggrieved may now be had, either by way of *certiorari*, or more usually by application to the Local Government Board for inquiry and decision (*o*).

(*h*) 29 & 30 Vict. c. 113, s. 11.

(*i*) *Ibid.* s. 12.

(*k*) *R. v. Gayer* (1757), 1 Burr. 245.

(*l*) See 1st order P. L. C. A.D. 1836, s. 27; 4 & 5 Will. 4, c. 76, ss. 42, 47; *R. v. Halifax* (1841), 10 L. J. M. C. 81.

(*m*) *R. v. Justices of Staffordshire* (1844), 13 L. J. M. C. 81.

(*n*) See 4 & 5 Will. 4, c. 76, s. 89; 1st order P. L. C. A.D. 1836, s. 10.

(*o*) 7 & 8 Vict. c. 101, s. 35; 11 & 12 Vict. c. 91, s. 4; 34 & 35 Vict. c. 70; 39 & 40 Vict. c. 61, s. 38.

CHAPTER VIII.

APPEALS UNDER INTOXICATING LIQUORS LICENSING ACTS.

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(1) <i>Of Certificates of Justices</i>	733	2. <i>Appeals against refusal to renew Licences or Certificates, or to transfer or grant interim Licences ..</i>	743
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SECTION 1.

OF THE LICENSING SESSIONS—GENERAL AND SPECIAL—AND
HEREIN OF TRANSFERS OF LICENCES AT PETTY SESSIONS.

It must be borne in mind that as there is now no appeal against the refusal to grant new licences, the law regarding the proceedings touching that matter is passed by as being beyond the scope of this work.

The general annual licensing meeting.

By the Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 1, the time and place of holding the general annual licensing meeting is prescribed in the following terms:—"In every division of every county and riding, and of every division of the county of Lincoln, and in every hundred of every county not being within any such division, and in every liberty, division of every liberty, county of a city, county of a town, city and town corporate, in that part of the United Kingdom called England, there shall be annually holden a special sessions of the justices of the peace (to be called the general annual licensing meeting), for the purpose of renewing licences to persons keeping or being about to keep inns, alehouses, and victualling houses, to sell exciseable liquors by retail to be drunk or consumed on the premises therein specified; and it shall be lawful for the justices acting in and for such county or place assembled at such meeting or at any adjournment thereof, and not as hereinafter disqualified from acting, to grant licences for the purposes aforesaid to such persons as

they the said justices shall in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper." The words "town corporate," "county or place," and "division or place," include every borough having a separate commission of the peace (*a*). By sect. 14 of the Licensing Act, 1902 (2 Edw. 7, c. 28), the general annual licensing meeting shall be held within the first fourteen days of February in each year, and every adjournment shall be held within one month of the general annual licensing meeting. It is not a proper exercise of their discretion for the justices, by a general resolution, to refuse to renew licences because the applicants refuse to bind themselves to accept a condition imposed by the justices, *e.g.*, one requiring them to take out an excise licence for the sale of spirits in addition to the beer licence (*b*); but they may refuse to grant fresh licences for the sale of beer on the premises, on the ground that there are already a sufficient number of licensed houses for the requirement of the district (*c*), and the same discretion seems to exist as to the renewal of licences for alehouses, or for beerhouses first licensed since 1st May, 1869 (*d*).

Of the general annual licensing meeting.

A power of adjourning such general annual licensing meeting is given by sect. 3 of the Alehouse Act, 1828, as follows:—"It shall be lawful for the justices acting at the general annual licensing meeting, and they are hereby required, to continue such meeting by adjournment to such day or days, and to such place or places within the division or place for which such meeting shall be holden as such justices may deem most convenient and sufficient for enabling persons keeping inns within such division or place to apply for such licence; provided, nevertheless, that the adjourned meeting to be holden next after such general annual licensing meeting shall not be so holden in or upon any of the five days next ensuing that on which such general annual licensing meeting shall have been holden as aforesaid."

Adjournment of general annual meeting.

Further facilities for licensed persons applying for the renewal of their licences are provided by the 42nd section of the 35 & 36 Vict. c. 94, which enacts, that "where a licensed person applies for the renewal of his licence, the following provisions shall have effect:—

Applications for renewals of licences.

- (1.) He need not attend in person at the general annual licensing meeting, unless he is required by the licensing justices so to attend:
- (2.) The justices shall not entertain any objection to the renewal of such licence, or take any evidence with

(*a*) 45 & 46 Vict. c. 50, s. 246.

(*b*) *R. v. Sylvester* (1862), 31 L. J. M. C. 93.

(*c*) *R. v. Justices of Lancashire* (1870), L. R. 6 Q. B. 97.

(*d*) *Ibid.*

respect to the renewal thereof, unless written notice of an intention to oppose the renewal of such licence has been served on such holder not less than seven days before the commencement of the general annual licensing meeting: provided, that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day when the case will be heard and the objection considered, as if the notice hereinbefore described had been given:

(3.) The justices shall not receive any evidence with respect to the renewal of such licence which is not given on oath:

Subject as aforesaid, licences shall be renewed, and the powers and discretion of justices relative to such renewal shall be exercised as heretofore."

Requisition to attend personally at renewal of licences.

And by 37 & 38 Vict. c. 49, s. 26, such requisition by the licensing justices to attend shall not be made save for some special cause personal to the licensed person to whom such requisition is sent; but it shall not be necessary to serve copies of notices of any adjournment of a general annual licensing meeting on holders of licences, or applicants for licences, who are not required to attend at such adjourned annual general licensing meeting; and a notice of intention to oppose the renewal of a licence served under sect. 42 of 35 & 36 Vict. c. 94, shall not be valid unless it states in general terms the grounds on which the renewal of such licence is to be opposed.

The word "personal" is fully satisfied by construing it as meaning "for a cause in which the applicant is personally interested" (e).

A licence taken out in the name of a dead man is a nullity and invalid (f).

A licence, what.

"Licence," in 35 & 36 Vict. c. 94, s. 74, means a licence for the sale of intoxicating liquors, granted by justices in pursuance of the Alehouse Act, 1828, including a certificate of justices granted under the Wine and Beerhouse Acts, and including a licence for the sale of sweets, which is hereby authorized to be granted in the same manner as if sweets were wine, and including a licence for the retail of spirits granted to a wholesale spirit dealer by the justices in pursuance of this Act.

A new licence, what.

A "new licence" in 35 & 36 Vict. c. 94, means a licence granted at a general annual licensing meeting, in respect to premises not theretofore licensed for the sale of intoxicating

(e) *Sharp v. Wakefield*, [1891] A. C. 173.
(f) *Cowles v. Gale* (1871), L. R. 7 Ch. 12.

liquors. The "renewal of a licence" means "a licence granted at a general annual licensing meeting by way of renewal," that is to say, the renewal of a licence in force during the previous year(*g*). The "transfer of a licence" means a transfer made in special sessions under 9 Geo. 4, c. 61, s. 4.

Renewal of a licence, what.
Transfer of a licence, what.

A "new licence," under 37 & 38 Vict. c. 49, s. 32, means a licence for the sale of any intoxicating liquor, granted at a general annual licensing meeting in respect of premises, in respect of which a similar licence has not theretofore been granted.

By 35 & 36 Vict. c. 94, s. 44, no licence shall be granted under the Intoxicating Liquor Licensing Acts to any person or in respect of any premises declared by or in pursuance of any of the Intoxicating Liquor Licensing Acts or in this Act to be disqualified persons or disqualified premises during the continuance of such disqualification. Any licence held by any person so disqualified or attached to premises so disqualified shall be void.

The transfer of licences at any period of the year is dealt with by the Alehouse Act (9 Geo. 4, c. 61), s. 4, as follows:—

Special licensing sessions.

"The justices assembled at the general annual licensing meeting in every year shall appoint not less than four nor more than eight special sessions, to be holden in the division or place for which each such meeting shall be holden, in the year next ensuing such general annual licensing meeting, at periods as near as may be equally distant; at which special session it shall be lawful for the justices then and there assembled, in the cases and in the manner and for the time hereinafter directed, to license such persons intending to keep inns theretofore kept by other persons, being about to remove from such inns, as they, the said justices, shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper persons, under the provisions hereinafter enacted, to be licensed to sell excisable liquors by retail to be drunk or consumed on the premises."

The 7th section empowers the county justices to attend and act at the annual licensing meeting when holden for a corporate or inferior jurisdiction when there are not two justices present legally competent to act:—"Whenever at any of the meetings to be holden as aforesaid, for any liberty, county of a city, county of a town, city or town corporate, there shall not be present at least two justices acting in and for any such liberty, county of a city, county of a town, city or town corporate, who are not disqualified, it shall be lawful for the justices acting in and for the county or counties adjoining to such liberty, county of a city, county of a town, city

County justices when empowered to act in corporate jurisdictions.

or town corporate, and not disqualified from acting, to act within such liberty or place, and with the justice or justices thereof, not as hereinbefore disqualified, who shall be present at any such meeting as aforesaid, for the purpose of granting or transferring licences under, or of hearing complaints as to offences against, this Act, any law, custom, or usage to the contrary notwithstanding."

Cinque ports exempted.

By sect. 8, the cinque ports are exempted from this last provision (*h*).

County justices to have no jurisdiction in a borough for licensing purposes.

By the 35 & 36 Vict. c. 94, s. 38, it is enacted, "from and after the passing of this Act the justices of a county shall not for licensing purposes, save in so far as respects the power of appointing members of a joint committee, have any jurisdiction in a borough in which the borough justices have for such purposes concurrent jurisdiction."

Questions to be decided by majority present.

By sect. 9 of 9 Geo. 4, c. 61, the mode of deciding on licences is thus ascertained:—"When (at any of the meetings aforesaid) any question touching the granting, withholding, or transferring any licence, or the fitness of the person applying for such licence, or of the house intended to be kept by such person, shall arise, such question shall be determined by the majority of justices, not disqualified, who shall be present when such question shall arise; and every licence granted under the authority of this Act shall be signed by the majority of the justices, not disqualified, who shall be present when such licence shall be granted."

Notices of application for a transfer of a licence.

By the 35 & 36 Vict. c. 94, s. 40, every person intending to apply for a new licence or to apply for the transfer of a licence, shall publish notice of such application as follows: that is to say, (1) in the case of a new licence, &c. (this provision is omitted here); (2) in the case of a transfer of a licence he shall, fourteen days prior to one of the special sessions appointed by the justices for granting transfers of such licences, serve a notice of his intention to transfer the same upon one of the overseers of the parish, township, or place in which the premises in respect of which his application is to be made are situate, and on the superintendent of police of the district. This notice shall be signed by the applicant, or by his authorized agent, and shall set forth the name of the person to whom it is intended the licence shall be transferred, together with the place of his residence and his trade or calling during the six months preceding the time of serving such notice.

Grant of interim licences.

The 14th section of 9 Geo. 4, c. 61, provides for granting fresh licences in the middle of the year, under certain precautions, in cases where there is a compulsory change of tenancy; it enacts that, "If any person, duly licensed under

(*h*) See 45 & 46 Vict. c. 50, s. 248.

this Act, shall (before the expiration of such licence) die, or shall be, by sickness or other infirmity, rendered incapable of keeping an inn, or shall become bankrupt, or if any person so licensed, or the heirs, executors, administrators or assigns of any person so licensed, shall remove from or yield up the possession of the house specified in such licence; or if the occupier of any such house, being about to quit the same, shall have wilfully omitted, or shall have neglected to apply at the general annual licensing meeting, or at any adjournment thereof, for a licence to continue to sell exciseable liquors by retail, to be drunk or consumed in such house; or if any house, being kept as an inn by any person duly licensed as aforesaid, shall be, or be about to be, pulled down or occupied under the provisions of any Act for the improvement of the highways, or for any other public purpose; or shall be, by fire, tempest, or other unforeseen and unavoidable calamity, rendered unfit for the reception of travellers and for the other legal purposes of an inn: it shall be lawful for the justices assembled as aforesaid at a special session, holden under the authority of this Act, for the division or place in which the house so kept or having been kept, shall be situate, in any one of the above-mentioned cases, and in such cases only, to grant to the heirs, executors or administrators of the person so dying, or to the assigns of such person becoming incapable of keeping an inn, or to the assignee or assignees of such bankrupt, or to any new tenant or occupier of any house having so become unoccupied, or to any person to whom such heirs, executors, administrators or assigns shall, by sale or otherwise, have *bonâ fide* conveyed or otherwise made over his or their interest in the occupation and keeping of such house, a licence to sell exciseable liquors by retail, to be drunk or consumed in such house, or the premises thereunto belonging; or to grant to the person whose house shall as aforesaid have been or shall be about to be pulled down or occupied for the improvement of the highways, or for any other public purpose, or have become unfit for the reception of travellers, or for the other legal purposes of an inn, and who shall open and keep as an inn some other fit and convenient house, a licence to sell exciseable liquors by retail, to be drunk or consumed therein: provided always, that every such licence shall continue in force only from the day on which it shall be granted until the 5th day of April then next ensuing: provided also, that every person intending to apply, in any of the above-mentioned cases, at any such special session for a licence to sell exciseable liquors by retail, to be drunk or consumed in a house or premises thereunto belonging, in which exciseable liquors shall not have been sold by retail, to be drunk or consumed on the premises, by virtue of a licence granted at the annual licensing meeting next before such special session, shall, on some one Sunday within the six weeks next before such special session, at some time between the hours of ten in

Interim
licences, when
granted.

To whom
granted.

Notices on application for interim licences.

the forenoon and four in the afternoon, fix or cause to be affixed on the door of such house, and on the door of the church or chapel of the parish or place in which such house shall be situate, and where there shall be no church or chapel, on some other public and conspicuous place within such parish or place, such and the like notice as is hereinbefore directed to be affixed by every person intending to apply at the general annual licensing meeting for a licence to sell exciseable liquors by retail, to be drunk or consumed in a house not theretofore kept as an inn, and shall in like manner serve copies of the said notice on one of the overseers of the poor, and on one of the constables or other peace officers of such parish or place."

Upon this section it appears that on the contingency of the removal or yielding up the possession of the house by the licensed person, the removal and yielding up must be during the currency of the licence (*k*), and it is in the discretion of the justices in special sessions to grant or refuse the interim licence (*l*); and after an application for the renewal of a licence for the house made on behalf of the new tenant at the general annual licensing meeting held during the currency of the licence, and refusal without appeal, it is not competent for the new tenant to apply at a subsequent special sessions after the licence has expired for an interim licence for the ensuing year (*m*); but an application by the old tenant on his own behalf, and refusal to him without appeal, does not bind the new tenant, who may apply at a subsequent special sessions (*n*).

Sheriffs' officers may not have licences.

By 9 Geo. 4, c. 61, s. 16, sheriffs' officers and all officers executing process of any court are disabled from receiving or using any licence under the grant, and the grant or transfer to them of any licence is made absolutely void.

Excise licences.

By 9 Geo. 4, c. 61, s. 17, no excise licence for retailing exciseable liquors is to be granted for consuming liquor on the premises, unless the magistrates' licence be previously obtained; and if such excise licence be granted it is a mere nullity.

By the 5 & 6 Vict. c. 44, s. 1, "at any petty session of justices of the peace holden in and for any division of every county and riding and in any hundred of every county not being within such division, and in every liberty, city, town or place within which any inn, alehouse or victualling-house shall be situated, and for which the said justices shall be acting at any time when no special session shall be holden for any such division, hundred, liberty, city, town or place, it shall be lawful in those cases where justices of the peace assembled at a special session are empowered by 9 Geo. 4

(*k*) *R. v. Justices of Birmingham* (1872), L. R. 7 Q. B. 482.

(*l*) *R. v. Rowell* (1872), L. R. 7 Q. B. 490.

(*m*) *R. v. Taylor* (1872), L. R. 7 Q. B. 487.

(*n*) *R. v. Justices of Middlesex* (1871), L. R. 6 Q. B. 781.

c. 6, s. 1, to transfer or grant licences before the expiration thereof to sell exciseable liquors by retail in the same house or premises in respect of which any person had been theretofore duly licensed, for the majority of the justices then present, upon application made to them at any such petty session, by indorsement under their hands and seals, on any licence which shall have been granted pursuant to the provisions of the said Act at any general licensing meeting, or at any adjournment thereof, to authorize (if they shall deem it proper so to do, after examining upon oath all necessary parties) any person not disqualified by the said Act to whom it shall be proposed at the time of such application to transfer or grant any such licence, to use, exercise and carry on the business of a licensed victualler at the same house and on the same premises, and there to sell such exciseable liquors as might theretofore have been lawfully sold and retailed therein: and thereupon it shall be lawful for the officer of excise empowered to transfer licences by indorsement on the excise licences required to be transferred, to give the like authority to the person so authorized by the magistrate or justices; and the authority so granted shall continue and be in force until the then next ensuing special session which shall be holden for the division, hundred, liberty, city, town or place within which such house and premises shall be situated, and no longer; at which special session the justices then and there assembled, upon application made to them pursuant to the said Act touching any transfer or grant of licence to the party or parties to whom such authority shall have been so given at petty sessions as aforesaid, shall hear and dispose of such application according to the provisions of the said Act: provided always, that nothing herein contained shall be construed to empower any justices at petty sessions to give any such authority as aforesaid within any of the divisions assigned or to be assigned to any of the police courts already established or to be established within the metropolitan police district, except in the borough of Southwark; but that any such application as is hereinbefore directed to be made at petty sessions shall, when the house and premises in respect whereof any licence shall have been obtained under the said Act shall be situated within any of the said police court divisions, and not in the borough of Southwark, be made to one of the police magistrates sitting at any of the said courts, and such magistrate shall in his discretion grant such authority in the manner and for the time hereinafter mentioned: provided also, that any person or persons who shall be authorized under the provisions of this Act to continue to carry on the business of a licensed victualler shall after the obtaining such authority and so long as the same shall continue in force be subject to all the powers, regulations, proceedings, penalties and provisions declared by or contained in any Act or Acts in force touching the regulation, government or control of licensed keepers of

Transfer or
grant of
licences at
petty sessions.

inns, alehouses and victualling-houses, in like manner as if the same had been repealed and re-enacted, and that all penalties and forfeitures imposed by any such Act or Acts shall be applied as directed by the same respectively."

The Licensing Act, 1902 (2 Edw. 7, c. 28), s. 16, provides that:—

"1. In the case of an application for a licence under section four or section fourteen of the Alehouse Act, 1828, the person holding the licence and the person who it is proposed shall become the holder of the licence shall attend at the special sessions at which the application is heard, and the agreement or other assurance, if any, under which the licence is to be transferred and held shall be produced to the licensing justices, and, for the purpose of compelling the attendance of any such person, or any witness, the licensing justices shall have all the powers of a court of summary jurisdiction.

"Provided that the licensing justices may for good cause shown in any particular case, dispense with the attendance of either of such persons or both.

"2. For the purpose of preventing repeated applications, the licensing justices may at the general annual licensing meeting make regulations determining the time which must elapse after the hearing of one application for a licence under sections four or fourteen of the Alehouse Act, 1828, before another application under the said sections, or either of them, may be made in respect of the same premises. Provided that justices may in their discretion, for good cause shown, dispense with the observance of these regulations in any particular case.

"3. The provisions of sub-section two of section forty of the Licensing Act, 1872, as to notices of intention to transfer, shall apply to all cases of applications under section four or section fourteen of the Alehouse Act, 1828.

"4. The provisions of sub-section four of section four of the Wine and Beerhouse Act, 1870, with respect to the adjournment of an application for a transfer, shall apply to all licences in cases arising under section four or section fourteen of the Alehouse Act, 1828, and where any such application is adjourned and there is in force an authority granted under the Licensing Act, 1842, to sell intoxicating liquor on the licensed premises, such authority shall continue in force till the hearing of the adjourned application, and the proper officer of Inland Revenue may give the like authority by indorsement on the excise licence."

By sect. 2 of 5 & 6 Vict. c. 44, "whenever it shall be proved to the satisfaction of any such magistrate, *i.e.*, a metropolitan police magistrate, or justices at petty sessions, *i.e.*, petty sessions sitting under the 1st section, upon any application made as aforesaid, that any licence granted pursuant to the said Act 9 Geo. 4, has been lost or mislaid, it shall and may be lawful for the said magistrate or justices to receive a copy of such licence, certified to be a true copy under the hand of the clerk to the

Licence lost
or mislaid, or
wilfully with-
held.

licensing justices by whom the said licence shall have been granted, and to make such indorsement thereon as he or they might make under the provisions of this Act upon the original licence; and such indorsement upon the copy so certified shall be as valid and effectual as if the same had been made upon the said licence."

And by the 35 & 36 Vict. c. 94, s. 41, and 47 & 48 Vict. c. 29, s. 1, the above section is to "be construed as if after the words 'lost or mislaid' there were inserted the words 'or if the application is for the grant of a licence or for the transfer of a licence which has been wilfully withheld by the holder thereof.'"

(1) Of Certificates of Justices.

By the Wine and Beerhouse Act, 1869 (*o*), sect. 4, no licence or renewal of a licence for the sale by retail of beer, cider or wine, or any of such articles under the provisions of any of the said recited Acts, shall (save as in this Act otherwise provided) be granted except upon the production and in pursuance of the authority of a certificate granted under this Act.

Certificates of justices.

Any licence granted or renewed in contravention of this enactment shall be void.

And by sect. 5 certificates under this Act shall be granted by the justices assembled at the general annual licensing meeting, held in pursuance of 9 Geo. 4, c. 61, or at some adjournment of such meeting held in pursuance of the said last-mentioned Act.

Granting of certificate.

By 33 & 34 Vict. c. 29, s. 4, par. 2, where a certificate is now required to be signed by a majority of justices, it shall be sufficient if, instead of such signature, the concurrence of such majority be signified by means of an impression from an official seal or stamp, in such form as the justices may direct, affixed in the presence of the justices in sessions assembled, and verified in the case of each certificate by the signature of their clerk.

Manner of granting.

Any seal purporting to be so affixed and verified shall be received in evidence without further proof; and if any unauthorized person imitate or affix an impression of a certificate, or knowingly use a certificate or imitation on a certificate falsely purporting to be sealed in pursuance of this section, he shall be guilty of forgery.

Of evidence. Forging certificate.

By sect. 4, par. 5, subject to the provisions of this section, all the provisions of the Act of the 9 Geo. 4, c. 61, and Acts amending the same, relating to the time for which justices'

The 9 Geo. 4, c. 61, and other Acts applied to

(*o*) 32 & 33 Vict. c. 27.

these certificates.

licences are to be in force, and relating to the fees payable for such licences, and relating to the transfer, removal, and transmission of such licences, and the grant of licences upon assignment, death, change of occupancy, or other contingency, and relating to copies of such licences, and relating to grants or transfers of such licences without the attendance of an applicant who is hindered by sickness, infirmity or other reasonable cause, shall have effect with regard to certificates granted, or to be granted, under the 32 & 33 Vict. c. 27, and this Act.

Notice of application.

By 32 & 33 Vict. c. 27, s. 7, every person intending to apply to the justices for a certificate under this Act, shall give notice in writing of his intention, as prescribed by that Act; but where application is made to the justices for the grant of a certificate under this Act, by way of renewal only, notice in pursuance of this section shall not be requisite.

Adjournment of applications.

By 33 & 34 Vict. c. 29, s. 11, where any applicant for the grant or renewal of a certificate has, through inadvertence or misadventure, failed to comply with any of the preliminary requirements of the principal Act, *i.e.*, 32 & 33 Vict. c. 27, or this Act, or any Act incorporated therewith, the justices may, if they shall so think fit, and upon such terms as they think proper, postpone the consideration of the application to an adjourned meeting; and if at such adjourned meeting the justices shall be satisfied that such terms have been complied with, they may proceed to grant or withhold such certificate, as if the preliminary requirements of the 32 & 33 Vict. c. 27, had been complied with.

Provisions of 9 Geo. 4, c. 61, applied to certificates under 32 & 33 Vict. c. 27.

By 32 & 33 Vict. c. 27, s. 8, all the provisions of the 9 Geo. 4, c. 61, as to the terms upon which and the manner in which and the persons to whom grants of licences are to be made by the justices at the said general annual licensing meeting, and as to appeal from any act of any justice shall, so far as may be, have effect with regard to grants of certificates under this Act, subject to this qualification, that no application for a certificate under this Act in respect of a licence to sell by retail [*beer*] (*p*), cider or wine, not to be consumed on the premises, shall be refused, except upon one or more of the following grounds, *viz.*,

Certificates to sell beer, &c., not to be consumed on the premises.

- (1.) That the applicant has failed to produce satisfactory evidence of good character:
- (2.) That the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented by thieves, prostitutes, or persons of bad character:
- (3.) That the applicant having previously held a licence for

(*p*) The word "beer" was struck out by 56 & 57 Vict. c. 54.

the sale of wine, spirits, beer or cider, the same has been forfeited for his misconduct, or that he has through misconduct been at any time previously adjudged disqualified from receiving any such licence, or from selling any of the said articles :

- (4.) That the applicant, or the house in respect of which he applies, is not duly qualified as by law is required.

Where an application for any such last-mentioned certificate is refused on the ground that the house in respect of which he applies is not duly qualified as by law is required, the justices shall specify in writing to the applicant the grounds of their decision.

By the Licensing Act, 1902 (2 Edw. 7, c. 28), s. 10, subsect. (2), it is enacted: "Notwithstanding anything contained in sect. 8 of the Wine and Beerhouse Act, 1869, and in sects. 69 and 74 of the Licensing Act, 1872, the licensing justices shall be at liberty in their free and unqualified discretion, except as hereinafter provided, either to refuse a licence for the sale of beer, wine, spirits, liqueurs, sweets or cider, by retail to be consumed off the premises, on any grounds appearing to them sufficient, or to grant a licence to such persons as they deem fit and proper.

"(3) Any application for the grant of a licence, to which this section applies, in respect of any premises on which the applicant was at the commencement of this Act authorized to sell beer, wine, spirits, liqueurs, sweets or cider, by retail to be consumed off the premises, shall be deemed to be an application for the renewal of a licence, and shall be subject to the provisions of the Licensing Acts relating to the renewal of licences.

"(4) Provided that where a licence for the sale of wine, spirits, liqueurs, sweets or cider, not to be consumed on the premises, was in force on the 25th day of June, 1902, an application for the renewal of such licence, or of any licence granted by way of renewal thereof from time to time, shall not be refused to the person who held such licence on the 25th day of June, 1902, except on one or more of the grounds on which it might have been refused if this Act had not passed, or on the ground that the licensee has sold surreptitiously under such licence, or has assisted in concealing or misrepresenting the nature of goods sold under such licence, or has in any other way, in the opinion of the licensing justices, been guilty of misconduct in the management of his business under such licence."

Where at the general annual licensing meeting a licence is refused for a house on the ground that the applicant has forfeited his licence for misconduct within the 3rd sub-section, that is a ground personal to that applicant; and that refusal will not operate to prevent another applicant if otherwise

Fresh application after refusal.

duly qualified, and able to give due notice of his application in time for the adjournment of the same licensing meeting, from applying for a licence for the same house (*q*); but if the ground of refusal to the applicant in the first instance has reference to the character of the house, the justices will not be required to adjudicate upon that matter again at the adjourned meeting, by reason of its being *res judicata* (*r*).

As to what constitutes a house of a disorderly character within this section, see *post*, p. 747.

Grounds of refusal of licence to sell spirits not to be consumed on the premises.

By 35 & 36 Vict. c. 94, s. 69, a licence for the sale of liqueurs or spirits by retail not to be consumed on the premises may, where such licence is required by this Act, be granted in the same manner in all respects in which a licence for selling wine not to be consumed on the premises may by law be granted; and an application for such a licence shall not be refused except upon one or more of the grounds on which a certificate in respect of a licence to sell by retail cider or wine not to be consumed on the premises may be refused.

By sect. 27 of 37 & 38 Vict. c. 49, as amended by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 39), no appeal shall be had to quarter sessions from any act of any justice with respect to the grant of new certificates under the Wine and Beerhouse Acts, 1869 and 1870.

Grounds for refusal of certificate to persons licensed to sell beer by retail to be consumed on the premises.

By 32 & 33 Vict. c. 27, s. 19, where a licence under any of the said recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate for the sale of beer, cider or wine to be consumed on the premises, in respect of such house or shop, except upon one or more of the grounds upon which an application for a certificate under this Act in respect of a licence for the sale of beer, cider or wine not to be consumed on premises, may be refused in accordance with this Act. But see now sect. 20 of the Licensing Act, 1902 (2 Ed. 7, c. 28).

By 33 & 34 Vict. c. 29, s. 7, sect. 19 of 32 & 33 Vict. c. 27 is to "extend to licences granted by way of renewal, from time to time, of licences in force on the 1st of May, 1869, whether such licences continue to be held by the same person, or have been, or may be, transferred to any other person or persons."

The justices retain their discretion to refuse a certificate in the case of a house licensed on the 1st of May, 1869, where the licence has lapsed before application is made for renewal (*t*), or where the applicant has not applied for a transfer

(*q*) *R. v. Justices of Yorkshire (West Riding)* (1869), L. R. 5 Q. B. 33.

(*r*) *Ibid.* p. 39, *per* Lush, J.

(*t*) *R. v. Curzon* (1873), L. R. 8 Q. B. 400.

under 9 Geo. 4, c. 61, s. 14, until after the current licence has expired (*u*), or where a house having been compulsorily purchased the licensee applies for a transfer of the licence to another house (*x*), or where alterations are so extensive as to make the house practically different (*y*), but otherwise where the house has been licensed, but the licence not exercised, and no beer sold (*z*).

(2) *Of the different Licences in respect of which Certificates are required.*

The Acts relating to beerhouses and refreshment-houses recited in 32 & 33 Vict. c. 27, were 11 Geo. 4 & 1 Will. 4, c. 64; 4 & 5 Will. 4, c. 85; 3 & 4 Vict. c. 61; 24 & 25 Vict. c. 21; 26 & 27 Vict. c. 33; 23 Vict. c. 27.

For the better supplying the public with beer, and in order to give greater facilities for the sale thereof than were then afforded by licences to keepers of inns, alehouses and victualing-houses, it is by 11 Geo. 4 & 1 Will. 4, c. 64, s. 1, made lawful for any and every person who shall obtain a licence for that purpose, under the provisions of that Act (*i.e.*, an excise licence) to sell beer, ale and porter by retail (and also cider and perry, sect. 30), in any part of England, in any house or premises specified in such licence.

Beerhouse
licences.

By sect. 2, no licence shall be granted to any person being a sheriff's officer, or officer executing the legal process of any court of justice, and any licence granted to any such person shall be void to all intents and purposes.

Sect. 7 contains a prohibition against selling without a licence, or under a licence which has expired.

By the 26 & 27 Vict. c. 33, s. 1, any person who shall have taken out an excise licence to sell strong beer in casks containing not less than four and a half gallons, or in not less than two dozen reputed quart bottles at one time, to be drunk or consumed elsewhere than on the premises, may take out an additional excise licence to authorize such person to sell beer in any less quantity, and in any other manner, than as aforesaid, but not to be drunk or consumed on the premises where sold.

Additional
licences to
sellers of
strong beer.

And by 33 & 34 Vict. c. 29, s. 10, a certificate for an additional licence to the holder of a strong beer dealer's licence to retail beer under 26 & 27 Vict. c. 33, shall not, except by way of renewal from time to time of a certificate in force at the time of the passing of this Act, be granted, unless upon the

(*u*) *Murray v. Freer*, [1894] A. C. 576.

(*x*) *Traynor v. Jones*, [1894] 1 Q. B. 83.

(*y*) *R. v. Justices of Sheffield* (1899), 63 J. P. 595.

(*z*) *Mackrell v. Justices of Brentford*, [1900] 2 Q. B. 387.

like proof of qualification according to rating as is required in the case of licences to retail beer for consumption on the premises, under the provisions of the Acts recited in the Wine and Beerhouse Act, 1869, for permitting the general sale of beer and cider by retail in England.

Annual value
of beerhouse
licence before
1840.

The rent or annual value of the house required by the 3 & 4 Vict. c. 61, see *post*, p. 740, is dispensed with by sect. 18 of that Act with respect to any house, at the time of the passing of that Act, duly licensed for the sale by retail of beer or cider, under 11 Geo. 4 & 1 Will. 4, c. 64, and 4 & 5 Will. 4, c. 85, or either of them, but it is lawful for the officers of excise, duly authorized to grant licences, to renew and continue to grant licences to such person (being in other respects properly qualified), so long as the person then occupying the house shall continue to be the resident holder and occupier of the same house, anything in this Act to the contrary notwithstanding.

Form of ap-
plication for
beerhouse
licence.

By 11 Geo. 4 & 1 Will. 4, c. 64, s. 2, in every application for such (*i.e.* excise) licence there shall be specified, set forth, and inserted the christian name and surname of the party applying for such licence, and a description of the house or premises in which beer, ale and porter is intended to be sold by retail by such person.

By 11 Geo. 4 & 1 Will. 4, c. 64, s. 30, it shall be lawful for any person desirous of selling cider and perry by retail to apply for and to obtain an excise licence for that purpose, under the same regulations in all respects as are prescribed with respect to persons desirous of selling beer, ale and porter by retail, and of being licensed for the purpose, &c.

As to refresh-
ment houses.

By 23 & 24 Vict. c. 27, s. 3, every person who shall keep a shop for the sale of any goods or commodities other than foreign wine, or who shall have taken out a licence as a dealer in wine (except persons expressly disqualified by this Act), shall, without producing or having any other licence or authority, be entitled to take out a licence under this Act to sell by retail, and in reputed quart or pint bottles only, in such shop, foreign wine not to be consumed on the premises where sold, anything in any former Act to the contrary notwithstanding.

Refreshment-
houses, what.

And by sect. 6, all houses, rooms, shops or buildings kept open for public refreshment, resort and entertainment, at any time between ten at night (24 & 25 Vict. c. 91, s. 8) and five o'clock of the following morning, not being licensed for the sale of beer, cider, wine or spirits respectively, shall be deemed refreshment-houses within this Act, and the resident owner, tenant or occupier thereof shall be required to take out a licence under this Act to keep a refreshment-house; and every person who shall keep any house, room, shop or building for the purpose of selling therein any victual or refreshment to be consumed on the premises where the same shall be sold (except beer, cider, wine and spirits sold respectively under a

proper licence in that behalf), and every person who shall keep any house, room, shop or building for the consumption therein by the public of any refreshment (except as aforesaid), although the same shall not be sold therein, may, if he shall think fit, take out a licence under this Act to keep a refreshment-house, and in all proceedings, and upon all occasions whatever, it shall be sufficient to describe by the term refreshment-house any house, room, shop or building in which such article as aforesaid (except as aforesaid) is sold to be consumed, or is consumed as aforesaid, without further or otherwise designating or describing the same.

By sect. 7, every person who shall be licensed to keep a refreshment-house, and shall pursue therein the trade or business of a confectioner, or shall keep open such house as an eating-house for the purpose of selling to be consumed therein animal food, or other victuals wherewith wine or other fermented liquors are usually drunk, shall be entitled (subject to the terms and conditions of this Act, and not being expressly disqualified thereby) to take out a licence to sell foreign wine by retail in such refreshment-house, to be consumed on the premises where the same shall have been sold, without producing or having any other licence or authority than as aforesaid, and every confectioner and eating-house keeper respectively, who shall have taken out such licence to retail wine under this Act, shall not be subject or liable to any penalty or forfeiture under any other Act or Acts by reason or on account of his selling wine by retail, or having the same in his possession in his entered premises, anything in any other Act or Acts to the contrary notwithstanding.

Wine licences to refreshment-house keepers, &c.

By sect. 8, provided always that no licence to sell foreign wine by retail, to be consumed on the premises, shall be granted for any refreshment-house which, with the premises belonging thereto and occupied therewith, shall be under the rent and value (now annual value) of 10*l.* a year, nor for any refreshment-house situated in any city, borough, town or place containing a population exceeding 10,000, according to the then last parliamentary census, if such refreshment-house, with the premises belonging thereto and occupied therewith, shall be under the rent and value (now annual value) of 20*l.* a year.

Annual value of premises for a wine licence.

And no sheriff's officer, or officer executing the legal process of any court of justice, shall be capable of receiving or using any licence under this Act to sell wine by retail, to be consumed on the premises; and every licence which shall be granted contrary hereto shall be void to all intents and purposes.

Refreshment-house licences.

Formerly by sect. 73 of 35 & 36 Vict. c. 94, no licence was required for the sale of wine by retail, not to be consumed on the premises, by a wine merchant, in pursuance of a wine dealer's licence granted by the commissioners of inland revenue, or for the sale of liqueurs or spirits by retail not to

be consumed on the premises by a wholesale spirit dealer whose premises were exclusively used for the sale of intoxicating liquors, in pursuance of a retail licence granted by the commissioners of inland revenue, under 24 & 25 Vict. c. 21 (a), but now, by sect. 10, sub-sect. 1 of the Licensing Act, 1902, notwithstanding anything contained in sect. 73 quoted above, a justice's licence shall be required in the case of every excise licence under which intoxicating liquor may be sold by retail to be consumed off the premises; provided that the sub-section shall not apply to any excise licence taken out by a spirit dealer or wine dealer for premises which are exclusively used for the sale of intoxicating liquors and mineral waters or other non-intoxicating drinks, and which have no internal communication with the premises of any person who is carrying on any other trade or business.

(3) *Of the requisite Value of Licensed Premises.*

Annual value
of beerhouse
premises.

The qualification in value of premises licensed for beer-houses before 35 & 36 Vict. c. 94, is fixed by 3 & 4 Vict. c. 61, s. 1, which recites the prior Beerhouse Acts, and enacts, that no licence to sell beer or cider by retail, under the said Acts or this Act, shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed; nor shall any such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township or place, in which such house and premises are situate, on a rent or annual value of 15*l.* per annum at the least if situate in the cities of London or Westminster, or within any parish or place within the bills of mortality, or within any city, cinque port, town corporate, parish or place, the population of which, according to the last parliamentary census, shall exceed 10,000, or within a mile, to be measured by the nearest public street or path, from any polling place used at the last election for any town having the like population and returning a member or members of parliament; nor shall any such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township or place, in which such house or premises are situate, on a rent or annual value of 11*l.* per annum, if situated within any city, cinque port, town corporate, parish or place, the population of which, according to such last parliamentary census, shall exceed 2,500, and shall not exceed 10,000, or within one mile, to be measured as aforesaid, from any polling place used at the last election for

(a) 35 & 36 Vict. c. 94, s. 73.

any town having the like population as last aforesaid, and returning a member or members of parliament: nor shall any such licence be granted in respect of any dwelling-house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township or place in which such house and premises are situate, on a rent or annual value of 8*l.*, if situated elsewhere than as aforesaid; and every licence granted contrary hereto shall be null and void.

Value of beer-house premises.

By 35 & 36 Vict. c. 94, s. 46, the above section is to be read as if "annual value" were therein substituted for "rent," "value," or "rent or annual value;" and a definition of annual value and a mode of ascertaining it is provided by that Act: see *post*, p. 742.

But a house licensed for the sale of table beer, at a price not exceeding three halfpence a quart, not to be drunk on the premises, need not be rated to the relief of the poor to any amount (*b*).

Under 3 & 4 Vict. c. 61, s. 1, the population of the parish in which the premises are situate is to govern the value, and the population of the townships, hamlets or villages of which it is composed, and in one of which the premises are situated, may be disregarded (*c*). A house and shop used as a grocery shop, communicating internally with one another and occupied together, are to be taken as one house and premises (*d*).

By 35 & 36 Vict. c. 94, s. 45, premises to which at the time of the passing of this Act no licence under the Acts recited in the Wine and Beerhouse Act of 1869, authorizing the sale of beer or wine for consumption thereupon, is attached, shall not be subject to any of the provisions now in force, prescribing a certain rent or value or rating as a qualification for receiving any such licence.

Licensed premises must be of a certain annual value.

Premises not at the time of the passing of this Act licensed for the sale of any intoxicating liquor for consumption thereupon shall not be qualified to receive a licence authorizing such sale unless the following conditions are satisfied:—

- (a) The premises, unless such premises are a railway refreshment-room, shall be of not less than the following annual value:

If situated within the City of London, or the liberties thereof, or any parish or place subject to the jurisdiction of the Metropolitan Board of Works, within the four mile radius from Charing Cross, or within the limits of a town containing a population

(*b*) 24 & 25 Vict. c. 21, s. 3.

(*c*) *Preston v. Buckler* (1870), L. R. 5 Q. B. 391; *Smith v. Redding* (1866), L. R. 1 Q. B. 489.

(*d*) *Garatty v. Potts* (1870), L. R. 6 Q. B. 86.

Annual value
of licensed
premises.

of not less than 100,000 inhabitants, 50*l.* per annum ;
or, if the licence do not authorize the sale of spirits,
30*l.* per annum ;

If situated elsewhere, and within the limits of a
town containing a population of not less than 10,000
inhabitants, 30*l.* per annum ; or, if the licence do not
authorize the sale of spirits, 20*l.* per annum ;

If situated elsewhere, and not within any such
town as above mentioned, 15*l.* per annum ; or, if the
licence do not authorize the sale of spirits, 12*l.* per
annum :

Structural
character of
the house.

- (b) The premises shall be, in the opinion of the licensing
authority, structurally adapted to the class of licence
for which a certificate is sought: provided, that no
house not licensed at the time of the passing of this
Act for the sale of any intoxicating liquor for con-
sumption on the premises, shall be qualified to have
a licence attached thereto authorizing such sale, un-
less such house shall contain, exclusive of the rooms
occupied by the inmates of such house if the licence
authorize the sale of spirits, two rooms; and if the
licence do not authorize the sale of spirits, one room,
for the accommodation of the public.

By sect. 46, which recites that "in certain cases a licence
under the Wine and Beerhouse Acts, 1869 and 1870, is not
to be granted, unless the house and premises in respect of
which such licence is granted are of such rent and value, or
are rated to the poor rate on a rent or annual value of such
amount as is respectively in that behalf stated in the Acts
recited in the Wine and Beerhouse Act, 1869, and it is
expedient to substitute in such cases annual value for the
said rent value or rating, and to provide for the ascertaining
the annual value of such house and premises: it is enacted,
that in cases not provided for by the last preceding section, a
licence under the Wine and Beerhouse Acts, 1869 and 1870,
shall not be granted in respect of any premises which are not,
in the opinion of the licensing justices who grant such licence,
of such annual value as is mentioned in that behalf in the
Acts recited by the Wine and Beerhouse Act, 1869; and
those Acts shall be construed as if 'annual value' were
therein substituted for 'rent,' 'value,' 'rated on a rent or
annual value,' and other like expressions."

A mode of
ascertaining
the annual

And by sect. 47, the licensing justices shall take such
means as may seem to them best for ascertaining the annual
value of any premises for the purposes of this Act, and may,

if they think fit, order a valuation to be made of such premises by a competent person appointed by them for the purpose, and may order the costs of such valuation to be paid by the applicant for a licence. The annual value of premises for the purposes of this Act shall be the annual rent which a tenant might be reasonably expected, taking one year with another, to pay for the same, if he undertook to pay all tenant's rates and taxes and tithe commutation rent (if any), and if the landlord undertook to bear the cost of the repairs, insurance and other expenses (if any) necessary to maintain the premises in a state to command the said rent, and if no licence were granted in respect thereof; but no land shall be included in such premises, other than any pleasure grounds, or any flower or kitchen garden, yard or curtilage usually held and occupied and used by the persons residing in and frequenting the house.

These provisions do not apply to houses licensed under 9 Geo. 4, c. 61, and the justices cannot impose a condition upon a licensee under that Act (*f*).

SECTION 2.

OF APPEALS AGAINST REFUSAL TO RENEW LICENCES OR CERTIFICATES, OR TRANSFER OR GRANT INTERIM LICENCES, ETC.

The effect of the statutes 9 Geo. 4, c. 61, s. 27; and 35 & 36 Vict. c. 94, s. 25, and Sched. 2, is to give an appeal to the quarter sessions against the refusal of the licensing magistrates to grant a licence by way of renewal at a general annual licensing meeting, or to transfer a licence under sects. 4 and 14. Power to appeal.

The words of the 27th section of 9 Geo. 4, c. 61, are—"That any person who shall think himself aggrieved by any act of any justice done in or concerning the execution of this Act, may appeal against such act to the next general or quarter sessions of the peace holden for the county or place wherein the cause of such complaint shall have arisen, unless such session shall be holden within twelve days next after such act

(*f*) *R. v. Justices of Exeter* (1873), L. R. 8 Q. B. 235.

shall have been done, and in that case to the next subsequent session holden as aforesaid, and not afterwards; provided that such person shall give to such justice notice in writing of his intention to appeal, and of the cause and matter thereof, within five days next after such act shall have been done, and seven days at the least before such session, and shall, within such five days, enter into a recognizance with two sufficient sureties, before a justice acting in and for such county or place as aforesaid, conditioned to appear at the said session, and to try such appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded; and upon such notice being given, and such recognizance being entered into, the justice before whom the same shall be entered into shall liberate such person, if in custody, for any offence in reference to which the act intended to be appealed against shall have been done; and the court at such sessions shall hear and determine the matter of such appeal, and shall make such order therein, with or without costs, as to the said court shall seem meet; and in case the act appealed against shall be the refusal to grant or to transfer any licence, and the judgment under which such act was done be reversed, it shall be lawful for the said court to grant or to transfer such licence in the same manner as if such licence had been granted at the general annual licensing meeting, or had been transferred at a special session; and the judgment of such court shall be final and conclusive to all intents and purposes: and in case of the dismissal of such appeal, or of the affirmation of the judgment on which such act was done, and which was appealed against, the said court shall adjudge and order the said judgment to be carried into execution, and costs awarded to be paid, and shall, if necessary, issue process for enforcing such order; provided that no justice shall act in the hearing or determination of any appeal to the general or quarter sessions as aforesaid, from any act done by him in or concerning the execution of this Act: provided also, that when any cause of complaint shall have arisen within any liberty, county of a city, county of a town, city, or town corporate, it shall be lawful for the person who shall think himself so as aforesaid aggrieved to appeal against any such act as aforesaid, if he shall think fit, to the quarter sessions of the county within or adjoining to which such liberty or place shall be situate, subject to all the provisions hereinbefore contained:" but sect. 27 is now confined to the renewal of licences or to the transfer of licences under sects. 4 and 14 of the same Act (g).

Who may
appeal.

The appellant must be a person immediately aggrieved by the act of the justice, *e.g.*, by the refusal of a licence, or a fine,

(g) 35 & 36 Vict. c. 94, ss. 74, 75, Sched.; and 37 & 38 Vict. c. 49, s. 27.

&c., and not one who is merely consequentially aggrieved: thus, the grant of a licence to a house to sell exciseable liquors which had not before been so licensed, was not a subject of appeal to the quarter sessions in respect of the possible injury to a neighbouring house which had been similarly licensed for sixteen years, and the sessions were held right in refusing to hear the appeal (*h*).

It has been held that mortgagees are persons aggrieved under this section, and where by the mortgage the licensee authorises the mortgagees to take all steps to preserve the licence, it has been held that the mortgagees may appeal against a refusal to renew, even if the licensee appear and state he does not wish for a renewal (*i*).

Under 37 & 38 Vict. c. 49, s. 15, an owner may apply for a transfer where a tenant has been convicted of certain offences (but see *post*, p. 770); and where a licensed person has become personally disqualified and has had his licence forfeited, the owner of the premises must apply under this section and not under 9 Geo. 4, c. 61, s. 14 (*k*), and the owner so applying and being refused has a right of appeal to quarter sessions (*l*).

Where an outgoing tenant wilfully refuses or neglects to apply for a renewal of the licence, the new tenant may apply under sect. 14 of the Alehouse Act, 1828, and if he is refused an appeal lies to quarter sessions (*m*); and where a licensee dies intestate, and no grant of letters of administration is made, a new tenant or occupier may apply under sect. 14, and if refused may appeal (*n*). And a holder of a provisional licence under sect. 22 of the Licensing Act, 1874, is also entitled to appeal to quarter sessions on a refusal to renew such provisional licence (*o*). Who may apply.

Appeals from the decision of borough justices lie to the county quarter sessions, and not to the recorder of the borough (*p*), the recorder's power being especially limited by 5 & 6 Will. 4, c. 76, s. 105, which is re-enacted by the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 165. To what sessions.

The quarter sessions must hear and determine the appeal at the next sitting of the sessions, and cannot adjourn the hearing to subsequent sessions (*q*), but adjourned sessions are a continuance of the original sessions, and are not subsequent

(*h*) *R. v. Justices of Middlesex* (1832), 3 B. & Ad. 938; *R. v. Justices of Surrey* (1888), 52 J. P. 423.

(*i*) *Garrett v. Justices of Middlesex* (1884), 12 Q. B. D. 620.

(*k*) *Stevens v. Justices of Green or Shornbrook* (1889), 23 Q. B. D. 143.

(*l*) *R. (or Newton) v. Justices of West Riding* (1883), 11 Q. B. D. 417.

(*m*) *Thornton v. Clegg and others* (1889), 24 Q. B. D. 132.

(*n*) *Davis v. Evans* (1898), 77 L. T. 688.

(*o*) *R. v. Justices of London County* (1889), 24 Q. B. D. 341.

(*p*) *R. v. Recorder of Bristol* (1854), 24 L. J. M. C. 43.

(*q*) *R. v. Belton* (1848), 17 L. J. M. C. 70.

Notice of
objection.

sessions within the meaning of the section, and an appeal may therefore be heard at such adjourned sessions (*r*).

In the case of an objection to a beerhouse licensed before 1869 the notice of objection must disclose one of the four grounds under sects. 8 and 10 of 32 & 33 Vict. c. 27, and a court of quarter sessions was wrong where they held otherwise (*s*).

Where, at the annual licensing meeting, an objection is raised (no notice having been given to the applicant), and the justices adjourn the meeting and direct that notice shall be given to the licensee by the superintendent of police under sect. 42 of the Licensing Act of 1872, such notice must contain an intimation that it is given by direction of the justices. The absence of such intimation is an irregularity which is waived by the appearance of the appellant, and on an appeal, which is in the nature of a re-hearing—the irregularity having been waived by the appearance—the court may entertain and decide the case on any objection raised by the notice (*t*).

A new subject of appeal is supplied by sect. 11, sub-sect. (4), of the Licensing Act, 1902, which enacts, "On any application for the renewal of a licence for the sale by retail of intoxicating liquors to be consumed on the premises, the licensing justices may require a plan of the premises to be produced before them, and to be deposited with their clerk, and on renewing any such licence they may by order direct that within a time fixed by the order such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed; but any such order shall be subject to an appeal to a court of quarter sessions, as provided by the Alehouse Act, 1828, and if any such order for structural alteration is made and complied with no further requisition for the structural alteration of the premises shall be made within the next five years."

Notice of
appeal.

The requirements as to notice are laid down by 9 Geo. 4, c. 61, s. 27, as amended by Baines' Act (12 & 13 Vict. c. 45). Notice must, therefore, now be given within five days next after the act complained of, and fourteen clear days before the sessions. Unless such fourteen days' notice can be given, the appeal is now to the next subsequent sessions. Notice must be given to all the justices who adjudicated (*u*), and may be served personally or by leaving it at the house of the justice (*x*).

(*r*) *R. v. Cambridge Union* (1861), 30 L. J. M. C. 137.

(*s*) *R. v. Eales* (1880), 42 L. T. 735.

(*t*) *Whiffen v. Justices of Malling*, [1892] 1 Q. B. 362.

(*u*) *R. v. Justices of Bedfordshire* (1839), 9 L. J. M. C. 8; *R. v. Justices of Cheshire* (1840), 9 L. J. M. C. 89.

(*x*) *R. v. Justices of North Riding* (1845), 14 L. J. M. C. 91.

The appellant must not go into or give evidence of any other ground of appeal besides those set forth in the notice (*y*). No objection to a defect in form only is to be allowed (*z*), and the court can sanction an amendment (*z*).

The recognizance must be entered into within five days from the refusal or act complained of, and if entered into too late, so that the appeal cannot be heard, yet the court of quarter sessions has jurisdiction to estreat the recognizances for non-payment of such costs as may have been awarded upon the dismissal of the appeal (*a*). The court has power under 12 & 13 Vict. c. 45, s. 8, to permit the substitution of a new and sufficient recognizance in the event of an imperfection in the existing recognizance. As to recognizances by a limited company, see *ante*, p. 450. Recognizances.

Where under sects. 8 and 19 of 32 & 33 Vict. c. 27, the renewal of a licence was refused, on the ground that the applicant had failed to produce satisfactory evidence of good character, it was held that fresh evidence of character was admissible before quarter sessions, and if that was satisfactory the appellant was entitled to a certificate (*b*). On appeal against a refusal to renew, the quarter sessions are not entitled to refuse to renew the licence without evidence of any ground of objection to its renewal (*c*). Evidence on appeal.

Where one of the grounds of objection is that the house is of a disorderly character, evidence may be tendered of convictions against previous tenants of the house, although the present holder be a man of good character (*d*). And where upon a transfer of a licence to sell beer on premises licensed before 1869 an objection is taken upon one of the four grounds mentioned in sect. 8 of 32 & 33 Vict. c. 27, and the justices grant the transfer, the same objection upon the same facts may be taken at the next general annual licensing meeting to the renewal of the licence, and the renewal may be refused on that ground (*e*).

By sect. 9 of the Alehouse Act, 1828, in dealing with cases coming under that section, the decision of a majority of justices not disqualified who are present, is required. So justices who are present but refuse to vote must be considered before a majority can be arrived at (*f*). This section has no application to courts of quarter sessions sitting on appeal, and where on an appeal against the refusal to renew Majority.

(*y*) 12 & 13 Vict. c. 45, s. 1; and see *Russell v. Justices of Blackheath* (1897), 61 J. P. 696.

(*z*) 12 & 13 Vict. c. 45, s. 3.

(*a*) *R. v. Justices of Glamorganshire* (1890), 24 Q. B. D. 675.

(*b*) *R. v. Pilgrim* (1870), L. R. 6 Q. B. 89.

(*c*) *Evans v. Justices of Conway*, [1900] 2 Q. B. 224, C. A.

(*d*) *R. v. Justices of Miskin Higher*, [1893] 1 Q. B. 275.

(*e*) *Smith v. Shann*, [1898] 2 Q. B. 347.

(*f*) *Carton v. Justices of Southampton* (1893), 57 J. P. 328.

a licence the court, consisting of four justices, was equally divided, and one justice withdrew, and the appeal was dismissed, it was held by the House of Lords that the appeal had been heard and determined, and that the appellant was not entitled to a mandamus to the quarter sessions to hear and determine it (*g*).

Under sects. 8 and 19 of the Wine and Beerhouse Act, 1869, on a refusal to renew the licence of certain houses regulated by that Act, it is necessary for the justices to state the grounds on which they refuse the licence. If this is not done, then, according to the judgment of Lord Herschell in *Ex parte Gorman* (*h*), the proper course for the appellant is to apply to the court for a mandamus to the licensing justices to hear and determine the case. Where the licence was refused, no grounds being stated, and the licensee appealed to quarter sessions, and took the objection that the licensing justices had stated no grounds for their decision, the court of quarter sessions overruled the objection, and tried and dismissed the appeal, the appellant withdrawing from the case. It was held by the House of Lords that the appeal had been rightly heard and that no mandamus would issue (*h*).

Who may
appear on
appeal.

The only proper respondents to the appeal are the justices themselves, who are served and may appear in the interests of the public to support their own decision. If an objector appears on the appeal, he does so voluntarily, and his counsel can only be heard by permission of the bench as *amicus curiæ*, and he can neither receive nor be ordered to pay costs (*i*). Nor have objectors any right to be heard on a case stated by quarter sessions in the divisional court (*j*).

Costs of
appeal.

By sect. 29 of 9 Geo. 4, c. 61, where notice of appeal has been given, if the appeal is dismissed, or judgment affirmed, or appeal abandoned, the court is required to adjudge that the appellant, or party having given notice of his intention to appeal, shall pay to the justices to whom notice was given the costs of the appeal, and upon neglect or refusal to pay, committal may be ordered; and if the judgment so appealed against is reversed, the court may, if it shall think fit, order the treasurer of the county or place in which the justice acted to indemnify such justice from all costs to which he may have been put. But the discretionary power as to the justice's costs given to the court under this section is now varied by sect. 20 of the Licensing Act, 1902 (*post*, p. 750).

The order as to costs should in certain cases direct that the sum be paid to the clerk of the peace, to be by him paid over to the party entitled to the same (*k*). But in boroughs having

(*g*) *Ex parte Evans*, [1894] A. C. 16.

(*h*) *Ex parte Gorman*, [1894] A. C. 24, at p. 28.

(*i*) *Per* Lord Davey in *Tynemouth Corporation v. Att.-Gen.*, [1899] A. C. 293, H. L.

(*j*) *Nix v. Justices of Nottingham*, [1899] 2 Q. B. 294, C. A.

(*k*) See 11 & 12 Vict. c. 43, s. 27; and 12 & 13 Vict. c. 45, s. 5.

a borough bench, but no separate court of quarter sessions, the costs are to be paid over, under 11 & 12 Vict. c. 43, s. 31, to the treasurer of the county, and not of the borough (*l*).

And by 12 & 13 Vict. c. 45, s. 18, any person entitled to enforce such order as to costs may have the same removed into the High Court, and thereupon the order may be enforced as a rule of the High Court.

It had been assumed that licensing appeals were regulated by the provisions of the Summary Jurisdiction Act, 1879, but this has now been held not to be law (*m*), and consequently the cases are now overruled which held that justices who appeared on an appeal and actively opposed it, and so made themselves parties, could be made to pay costs if unsuccessful.

As the appeal from licensing justices is not under the Summary Jurisdiction Acts, but under 9 Geo. 4, c. 61, s. 27, the power to give costs on an appeal against a refusal to renew or transfer a licence is derived from sect. 29 only. Quarter sessions have, therefore, no power to give costs against an objector who appears at a licensing meeting and successfully opposes a renewal, but on appeal to quarter sessions does not appear (*n*). And where upon an appeal to quarter sessions against a refusal by licensing justices to renew a licence the justices appear and oppose the renewal, the quarter sessions has no power to order the licensing justices to pay costs to the appellant in the event of the appeal being allowed (*n*). Costs against
objector.

But where an appeal under similar circumstances is dismissed, it has been held that sect. 29 of 9 Geo. 4, c. 61, makes it imperative for the court of quarter sessions to entertain an application by the licensing justices for costs against the appellants (*o*). Where the judgment of licensing justices is reversed on appeal, and the court of quarter sessions make an order under sect. 29 for payment by the treasurer of the county of a sum to indemnify the justices, the words of the section must be strictly complied with, and the amount of costs, if not ascertained by the court itself, should be ascertained by the taxation of the clerk of the peace, and his taxation should be adopted by the court during the currency of the sessions; the costs can only be taxed out of session by consent (*p*). But such sum to be paid to the respondent justices must not include a sum to satisfy a successful appellant's costs (*q*). An objector who appears to oppose an appeal can neither receive nor be ordered to pay costs (*r*). Justices'
costs.

(*l*) *Winn v. Mossman* (1869), L. R. 4 Ex. 292.

(*m*) *Boulter v. Justices of Kent*, [1897] A. C. 569.

(*n*) *R. v. Justices of Staffordshire*, [1898] 2 Q. B. 231.

(*o*) *R. v. Justices of Worcestershire*, [1900] 2 Q. B. 576.

(*p*) *R. v. Winder*, [1900] 2 Q. B. 666. But see now sect. 20 of the Licensing Act, 1902.

(*q*) *R. v. Justices of London, Ex parte London County Council* (1898), 78 L. T. 559.

(*r*) *Tynemouth Corporation v. Att.-Gen.*, [1899] A. C. 293.

The costs must be taxed before the close of the sessions (*t*) or before or at an adjournment (*u*), but the parties may arrange to tax out of court, and the slightest evidence of consent will suffice to support taxation out of court (*x*).

Licensing
Act, 1902,
s. 20.

By sect. 20 of the Licensing Act, 1902, it is now provided: "In every case of appeal against the decision of any licensing justice the court to which such appeal is made shall adjudge and order that the treasurer of the county or place in and for which such justice whose decision is appealed against shall have acted on the occasion when he gave such decision, shall pay to such justice such sum as, in the opinion of the court, shall be sufficient to indemnify such justice from all costs and charges whatsoever to which such justice may have been so put, and which cannot be recovered from any other person, and the said treasurer is hereby authorised to pay the same, which shall be allowed to him in his accounts. The order of the appellate court may be made either at the sessions when the appeal is heard, or at the next ensuing sessions, and the costs may be taxed either in or out of sessions."

A court of quarter sessions must not make rules which amount to imposing an additional condition to the appeal which the statute has imposed (*y*).

By the Licensing Act, 1902, s. 11, sub-s. 4, it is provided that upon an application for the renewal of a licence for the sale by retail of intoxicating liquors to be consumed on the premises, the licensing justices may direct that such alterations as they think necessary shall be made in that part of the premises where intoxicating liquor is sold or consumed; but any such order shall be subject to an appeal to a court of quarter sessions, as provided by the Alehouse Act, 1828.

SECTION 3.

OF SUMMARY ORDERS AND CONVICTIONS, AND OF APPEALS AGAINST THEM.

Offences
against
Licensing
Acts.

The Licensing Acts of 1872, 1874 and 1902, now for the most part regulate the sale of intoxicating liquors, and the conduct of houses wherein they are sold.

(*t*) *R. v. Long* (1841), 1 Q. B. 740; *R. v. Justices of Hants* (1864), 33 L. J. M. C. 104; *sub nom. Isle of Wight Ferry Co. v. Ryde Commissioners*, 7 L. T. 391. But see sect. 20 of the Licensing Act, 1902.

(*u*) *R. v. Justices of Hants, sup.*; *Rawnsley v. Hutchinson* (1871), L. R. 6 Q. B. 305.

(*x*) *Midland Rail. Co. v. Edmonton Guardians*, [1895] A. C. 485.

(*y*) *R. v. Pawlatt* (1873), L. R. 8 Q. B. 491; *R. v. Bird, Ex parte Needes*, [1898] 2 Q. B. 340.

By 35 & 36 Vict. c. 94, s. 3, no person shall sell or expose for sale by retail any intoxicating liquor without being duly licensed to sell the same, or at any place where he is not authorised by his licence to sell the same. Any person selling or exposing for sale by retail any intoxicating liquor which he is not licensed to sell by retail, or selling or exposing for sale any intoxicating liquor at any place where he is not authorised by his licence to sell the same, shall be subject to the following penalties; that is to say,

- (1.) For the first offence he shall be liable to a penalty not exceeding fifty pounds, or to imprisonment with or without hard labour for a term not exceeding one month: First offence.
- (2.) For the second offence he shall be liable to a penalty not exceeding one hundred pounds, or to imprisonment with or without hard labour for a term not exceeding three months, and he may, by order of the court by which he is tried, be disqualified for any term not exceeding five years from holding any licence for the sale of intoxicating liquors: Second offence.
- (3.) For the third and any subsequent offence he shall be liable to a penalty not exceeding one hundred pounds, or to imprisonment with or without hard labour for any term not exceeding six months, and may by order of the court by which he is tried be disqualified for any term of years or for ever from holding any licence for the sale of intoxicating liquors: Third offence.

In addition to any other penalty imposed by this section any person convicted of a second or any subsequent offence under this section shall, if he be the holder of a licence, forfeit such licence, and in the case of a conviction for any offence under this section, the court may, if it thinks expedient so to do, declare all intoxicating liquor found in the possession of any such person as last aforesaid, and the vessels containing such liquor, to be forfeited.

No penalty shall be incurred under this section by the heirs, executors, administrators or assigns of any licensed person who dies before the expiration of his licence, or by the trustee of any licensed person who is adjudged a bankrupt [*or whose affairs are liquidated by arrangement*] before the expiration of his licence in respect of the sale or exposure for sale of any intoxicating liquor, so that such sale or exposure for sale be made on the premises specified in such licence, and take place prior to the special sessions then next ensuing, or (if such special session be holden within fourteen days next after the death of the said person or the appointment of a trustee in the case of his bankruptcy [*or the liquidation of his affairs by arrangement*]) take place prior to the special session holden next after such special session as last aforesaid. Of illicit sales.

A man, *bonâ fide* acting under a magistrate's licence appearing to be properly signed, cannot be fined because it may

appear that the signatures of the magistrates were not properly obtained (z).

Liability of occupiers.

By 35 & 36 Vict. c. 94, s. 4, the occupier of any unlicensed premises on which any intoxicating liquor is sold, or if such premises are occupied by more than one person, every occupier thereof shall, if it be proved that he was privy or consenting to the sale, be subject to the penalties imposed upon persons for the sale of intoxicating liquors without licence.

Penalty when liquor illicitly sold is drunk on the premises.

By sect. 5, if any purchaser of any intoxicating liquor from a person who is not licensed to sell the same to be drunk on the premises drinks such liquor on the premises where the same is sold, or on any highway adjoining or near such premises, the seller of such liquor shall, if it shall appear that such drinking was with his privy or consent, be subject to the following penalties; (that is say,)

For the first offence he shall be liable to a penalty not exceeding ten pounds :

For the second and any subsequent offence he shall be liable to a penalty not exceeding twenty pounds.

Premises, what.

For the purposes of this section the expression "premises where the same is sold" shall include any premises adjoining or near the premises where the liquor is sold, if belonging to the seller of the liquor or under his control, or used by his permission.

Evading licence for the sale of liquors not to be drunk on the premises.

By sect. 6, if any person having a licence to sell intoxicating liquors not to be drunk on the premises, himself takes or carries, or employs or suffers any other person to take or carry, any intoxicating liquor out of or from the premises of such licensed person for the purpose of being sold on his account, or for his benefit or profit, and of being drunk or consumed in any other house, or in any tent, shed or other building of any kind whatever, belonging to such licensed person, or hired, used or occupied by him, or on or in any place, whether enclosed or not, and whether or not a public thoroughfare, such intoxicating liquor shall be deemed to have been consumed by the purchasers thereof on the premises of such licensed person, with his privy and consent, and such licensed person shall be punished accordingly in manner provided by this Act.

In any proceeding under this section it shall not be necessary to prove that the premises or place or places to which such liquor is taken to be drunk belonged to, or were hired, used or occupied by the seller, if proof be given to the satisfaction of the court hearing the case that such liquor was taken to be consumed thereon or therein with intent to evade the conditions of his licence.

Selling spirits to young persons.

By 35 & 36 Vict. c. 94, s. 7, every holder of a licence who sells or allows any person to sell, to be consumed on the premises, any description of spirits to any person apparently

(z) *R. v. Minshull* (1833), 1 N. & M. 277.

under the age of sixteen years, shall be liable to a penalty not exceeding twenty shillings for the first offence, and not exceeding forty shillings for the second and any subsequent offence.

By the Intoxicating Liquors (Sale to Children) Act, 1901 (1 Ed. 7, c. 27), s. 2, it is provided that every holder of a licence who knowingly (zz) sells or delivers or allows any person to sell or deliver, save at the residence or working place of the purchaser, any description of intoxicating liquor to any person under the age of fourteen years for consumption by any person on or off the premises, excepting such intoxicating liquors as are sold or delivered in corked and sealed vessels in quantities not less than one reputed pint for consumption off the premises only, shall be liable to a penalty not exceeding forty shillings for the first offence, and not exceeding five pounds for any subsequent offence; and every person who knowingly sends any person under the age of fourteen years to any place where intoxicating liquors are sold or delivered or distributed for the purpose of obtaining any description of intoxicating liquor, excepting as aforesaid, for consumption by any person on or off the premises, shall be liable to like penalties.

Sect. 3 provides that nothing in this Act shall prevent the employment by a licensed person of a member of his family or his servant or apprentice as a messenger to deliver intoxicating liquors.

In a recent case where a beer retailer had been convicted under sect. 2 above, a case was stated by the justices. It was proved that a gummed paper label was affixed over the screw stopper of the bottle, extending about an inch down two sides of the neck of the bottle. The label was dry at the time of the sale, but by moistening the label with the tongue and so damping the gum the label could be removed without its being torn. The justices found that the bottle was not sealed as required by the Act, and convicted the appellant, and the Divisional Court held that there was evidence to support the finding of the justices (a).

By 35 & 36 Vict. c. 94, s. 8, every person shall sell all intoxicating liquor which is sold by retail and not in cask or bottle, and is not sold in a quantity less than half a pint, in measures marked according to the imperial standards. Sale to be in standard measures.

Every person who acts or suffers any person under his control or in his employment to act in contravention of this section shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for any subsequent

(zz) A licensee in charge of his house is not liable under this section for the act of his servant who, without his knowledge or connivance, sells to a child under fourteen years of age liquor in an uncorked and unsealed bottle: *Emary v. Nolloth*, [1903] 2 K. B. 264; and see *Brooks v. Mason*, [1902] 2 K. B. 743; and *Macey v. McKenzie* (1903), 88 L. T. 631.

(a) *Mitchell v. Crawshaw*, [1903] 1 K. B. 701.

offence twenty pounds, and shall also be liable to forfeit the illegal measure in which the liquor was sold.

Using internal communication with unlicensed premises.

By sect. 9, every person who makes or uses, or allows to be made or used, any internal communication between any licensed premises and any unlicensed premises which are used for public entertainment or resort, or as a refreshment house, shall be liable to a penalty not exceeding ten pounds for every day during which such communication remains open.

In addition to any penalty imposed by this section, any person convicted of an offence under this section shall, if he be the holder of a licence, forfeit such licence; and see *post*, 37 & 38 Vict. c. 49, s. 15.

Licensed person having possession of liquor not authorised by his licence.

By sect. 10, if any licensed person has in his possession, on the premises in respect of which his licence is granted, any description of intoxicating liquor which he is not authorised to sell, unless he shall account for the possession of the same to the satisfaction of the court by which he is tried, he shall forfeit such liquor and the vessels containing the same, and shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for any subsequent offence twenty pounds.

Illicit sales. Evidence of illicit sale.

By sect. 62, in proving the sale or consumption of intoxicating liquor for the purpose of any proceeding relative to any offence under this Act, it shall not be necessary to show that any money actually passed or any intoxicating liquor was actually consumed, if the court hearing the case be satisfied that a transaction in the nature of a sale actually took place, or that any consumption of intoxicating liquor was about to take place; and proof of consumption or intended consumption of intoxicating liquor on premises to which a licence under this Act is attached, by some person other than the occupier of or a servant in such premises, shall be evidence that such liquor was sold to the person consuming, or being about to consume, or carrying away the same by or on behalf of the holder of such licence.

Keeping name painted on door.

By 35 & 36 Vict. c. 94, s. 11, every licensed person shall cause to be painted or fixed, and shall keep painted or fixed on the premises in respect of which his licence is granted, in a conspicuous place and in such form and manner as the licensing justices (*b*) may from time to time direct, his name, with the addition after the name of the word "licensed," and of words sufficient, in the opinion of the said justices, to express the business for which his licence has been granted, and in particular of words expressing whether the licence authorises the sale of intoxicating liquor to be consumed on or off the premises only, as the case may be; and no person shall have any words or letters on his premises importing that he is authorised as a licensed person to sell any intoxica-

(b) 37 & 38 Vict. c. 49, s. 28.

ting liquor which he is not in fact duly authorised to sell. Every person who acts in contravention of the provision of this section shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offence twenty pounds. As to early-closing licences, see p. 762, and as to six-day licences, see p. 765.

By 35 & 36 Vict. c. 94, s. 12, every person found drunk in any highway or other public place, whether a building or not, or on any licensed premises, shall be liable to a penalty not exceeding ten shillings, and, on a second conviction within a period of twelve months, shall be liable to a penalty not exceeding twenty shillings; and, on a third or subsequent conviction within such period of twelve months, be liable to a penalty not exceeding forty shillings. Drunkenness.

Every person who in any highway or other public place, whether a building or not, is guilty while drunk of riotous or disorderly behaviour, or who is drunk while in charge on any highway or other public place of any carriage, horse, cattle or steam-engine, or who is drunk when in possession of any loaded fire-arms, may be apprehended, and shall be liable to a penalty not exceeding forty shillings, or, in the discretion of the court, to imprisonment with or without hard labour for any term not exceeding one month. Punishing drunkenness.

Where the court commits any person to prison for non-payment of any penalty under this section, the court may order him to be imprisoned with hard labour.

By 35 & 36 Vict. c. 94, s. 13, if any licensed person permits drunkenness, or any violent, quarrelsome or riotous conduct to take place on his premises, or sells any intoxicating liquor to any drunken person, he shall be liable to a penalty not exceeding for the first offence ten pounds, and not exceeding for the second and any subsequent offence twenty pounds. Drunkenness or riotous conduct.

A conviction for permitting drunkenness and riotous conduct is not double; for the offence is the permission which may, at one and the same time, be both of drunkenness and riotous conduct (*c*), and the names of the drunkards, &c. need not be set out.

By the Licensing Act, 1902 (2 Edw. 7, c. 28), s. 1, it is enacted, that if a person is found drunk in any highway or other public place, whether a building or not, or on any licensed premises, and appears to be incapable of taking care of himself, he may be apprehended and dealt with according to law.

By sect. 2 (1), if any person is found drunk in any highway, or other public place, whether a building or not, or on any licensed premises, while having the charge of a child apparently under the age of seven years, he may be apprehended, and shall, if the child is under that age, be liable on summary

conviction to a fine not exceeding forty shillings, or to imprisonment, with or without hard labour, for any period not exceeding one month.

(2) If the child appears to the court to be under the age of seven the child shall, for the purposes of this section, be deemed to be under that age, unless the contrary is proved.

(3) The offence under this section shall be included in the list of offences mentioned in the First Schedule to the Inebriates Act, 1898, and in sect. 60 of the Licensing Act, 1872.

By sect. 4 (1), where a licensed person is charged with permitting drunkenness on his premises, and it is proved that any person was drunk on his premises, it shall lie on the licensed person to prove that he, and the persons employed by him, took all reasonable steps for preventing drunkenness on the premises.

By sect. 6, where, upon the conviction of an offender, the court is satisfied that an order of detention could be made under sect. 1 or sect. 2 of the Inebriates Act, 1898, then, whether an order of detention is made or not, the court shall order that notice of the conviction, with such particulars as may be prescribed by a secretary of state, be sent to the police authority (within the meaning of the Police Act, 1890) for the police area in which the court is situate.

By a recent case it has been held that the register of the minutes or memorandum of convictions of a court of summary jurisdiction, which has to be kept under sect. 22 of the Summary Jurisdiction Act, 1879, by the clerk of the court, is admissible in evidence to prove a previous conviction of the defendant for a similar offence in the same court. The consent of the defendant to be tried summarily under sect. 2 of the Inebriates Act, 1898, is necessary before a magistrate can make an order under sect. 6, sub-sect. 1, of the Licensing Act, 1902 (*d*).

By sect. 6 (2), where a court, in pursuance of this Act, orders notice of a conviction to be sent to a police authority, the court shall inform the convicted person that the notice is so to be sent; and

- (a) If the convicted person, within three years after the date of the conviction, purchases or obtains, or attempts to purchase or obtain, any intoxicating liquor at any premises licensed for the sale of intoxicating liquor by retail, or at the premises of any club registered in pursuance of Part 3 of this Act, he shall be liable on summary conviction to a fine not exceeding for the first offence 20s., and for any subsequent offence 40s.
- (b) If the holder of any licence authorising the sale of intoxicating liquor by retail, whether for consump-

tion on or off the premises, or any person selling, supplying, or distributing intoxicating liquor, or authorising such sale, supply or distribution, on the premises of a club registered in conformity with the provisions of Part 3 of this Act within that period, knowingly sells, supplies or distributes, or allows any person to sell, supply or distribute, intoxicating liquor to or for the consumption of any such person, he shall be liable on summary conviction, for the first offence, to a fine not exceeding 10*l.*, and for any subsequent offence in respect of the same person to a fine not exceeding 20*l.*

By sect. 7, any person who, being on any premises licensed for the sale of any intoxicating liquor, whether for consumption on or off such premises, shall procure, or attempt to procure, any intoxicating liquor for consumption by any drunken person, or who shall aid and abet any drunken person in obtaining or consuming any intoxicating liquor on any premises so licensed as aforesaid, shall be liable on summary conviction to a fine not exceeding 40*s.*, or to imprisonment, with or without hard labour, for any period not exceeding one month.

By 35 & 36 Vict. c. 94, s. 14, if any licensed person knowingly permits his premises to be the habitual resort of, or place of meeting of, reputed prostitutes, whether the object of their so resorting or meeting is or is not prostitution, he shall, if he allow them to remain thereon longer than is necessary for the purpose of obtaining reasonable refreshment, be liable to a penalty not exceeding for the first offence 10*l.*, and not exceeding for the second and any subsequent offence 20*l.*

Permitting prostitutes to meet on premises.

By 34 & 35 Vict. c. 112, s. 10, every person who occupies or keeps any lodging-house, beer-house, public-house, or other house or place where intoxicating liquors are sold, or any place of public entertainment or public resort, and knowingly lodges, or knowingly harbours, thieves or reputed thieves, or knowingly permits or knowingly suffers them to meet or assemble therein, or knowingly allows the deposit of goods therein, having reasonable cause for believing them to be stolen, shall be guilty of an offence against this Act and liable to a penalty not exceeding 10*l.*, and in default of payment to be imprisoned for a period not exceeding four months, with or without hard labour, and the court before which he is brought may, if it think fit, in addition to or in lieu of any penalty, require him to enter into recognizances, with or without sureties, for keeping the peace or being of good behaviour for twelve months. Provided that (1) No person shall be imprisoned for not finding sureties, in pursuance of this section, for a longer period than three months; and (2) The security required from a surety shall not exceed 20*l.* And any licence for the sale of intoxicating liquors, or for keeping any place of public entertainment or resort, which has been granted to the occupier or keeper of any such house

Harbouring thieves or stolen property.

or place as aforesaid, may, in the discretion of the court, be forfeited on his first conviction of an offence under this section, and on his second conviction for such offence his licence shall be forfeited, and he shall be disqualified for a period of two years from receiving any such licence; moreover, when two convictions under this section have taken place within a period of three years, in respect of the same premises, whether the persons convicted were or were not the same, the court shall direct that, for a term not exceeding one year from the date of the last of such convictions, no such licence as aforesaid shall be granted to any person whatever in respect of such premises, and any licence granted in contravention of this section shall be void.

Non-produce-
tion of
licences.

Any licensed person brought before a court in pursuance of this section shall produce his licence for examination, and if such licence is forfeited shall deliver it up altogether; and if such person wilfully neglects or refuses to produce his licence, he shall, in addition to any other penalty under this section, be liable, on summary conviction, to a penalty not exceeding 5*l*. Provided that any person convicted under this section shall have a right to appeal against such conviction in the same manner in all respects as if the said conviction had been for an offence committed against the provisions of the Licensing Act, 1872 (35 & 36 Vict. c. 94).

A meeting known as a friendly "lead," for the purpose of collecting money for an accused person, is within this section, if the persons assembling are thieves or reputed thieves (*e*).

Evidence of what took place on previous occasions, for instance, as to the character of the persons assembled, is evidence to prove the defendant's knowledge of their character (*f*).

Brothels.

By 35 & 36 Vict. c. 94, s. 15, if any licensed person is convicted of permitting his premises to be a brothel, he shall be liable to a penalty not exceeding 20*l*., and shall forfeit his licence, and he shall be disqualified for ever from holding any licence for the sale of intoxicating liquors.

Harbouring
constables on
duty.

By sect. 16, if any licensed person—

(1.) Knowingly harbours, or knowingly suffers to remain on his premises, any constable during any part of the time appointed for such constable being on duty, unless for the purpose of keeping or restoring order, or in execution of his duty; or

Supplying
liquor to con-
stables on
duty.

(2.) Supplies any liquor or refreshment, whether by way of gift or sale, to any constable on duty, unless by authority of some superior officer of such constable; or

Bribing con-
stables.

(3.) Bribes, or attempts to bribe, any constable, he shall be liable to a penalty not exceeding for the first

(*e*) *Maskell v. Fox* (1871), L. R. 6 Q. B. 370.
(*f*) *Parker v. Green* (1862), 31 L. J. M. C. 133.

offence 10*l.*, and not exceeding for the second or any subsequent offence 20*l.*

A licensed person is liable to be convicted of supplying liquor, under the second sub-section, though he were not present at the time when the liquor was supplied, and though it was not supplied by his express authority, if his servant, in the ordinary performance of her duty of supplying liquor, so supplied it to a constable in uniform and on duty (*g*). Supplying liquor to constable on duty.

By 35 & 36 Vict. c. 94, s. 17, if any licensed person—

(1.) Suffers any gaming or any unlawful game to be carried on on his premises; or Gaming on premises.

(2.) Opens, keeps, or uses, or suffers his house to be opened, kept, or used in contravention of the Betting Act, 1853 (16 & 17 Vict. c. 119), Betting.

he shall be liable to a penalty not exceeding for the first offence 10*l.*, and not exceeding for the second and any subsequent offence 20*l.*

Any playing at cards for money in any part of the licensed premises is within this section; therefore, a friendly game of cards among the private friends of the innkeeper for a small stake, in the bar parlour, is an offence (*h*); but a game of dominoes is not an unlawful game, and, unless money is staked upon it, is not gaming so as to bring it within the section (*i*). And to constitute gaming, the game played must be one which involves the element of wagering; each player must have a chance of losing as well as of winning. So where a number of persons hired a room in a hotel for the purpose of playing whist, and they played for prizes not subscribed for by the players but given by third parties, it was held that the whist so played did not amount to gaming within this section (*k*). “Unlawful games,” what.

By sect. 18, any licensed person may refuse to admit to and may turn out of the premises in respect of which his licence is granted any person who is drunken, violent, quarrelsome or disorderly, and any person whose presence on his premises would subject him to a penalty under this Act. Power to refuse to admit drunken persons.

Any such person who, upon being requested in pursuance of this section by such licensed person, or his agent or servant, or any constable, to quit such premises, refuses or fails so to do, shall be liable to a penalty not exceeding 5*l.*, and all constables are required on the demand of such licensed person, agent or servant to expel, or assist in expelling, every such person from such premises, and may use such force as may be required for that purpose. Power to turn out drunken persons, &c.

The court committing any person to prison for non-payment of any penalty under this section, may order him to be imprisoned with hard labour.

(*g*) *Mullens v. Collins* (1874), L. R. 9 Q. B. 292.

(*h*) *Patten v. Rhymmer* (1860), 29 L. J. M. C. 189.

(*i*) *R. v. Ashton* (1852), 22 L. J. M. C. 1.

(*k*) *Lockwood v. Cooper*, [1903] 2 K. B. 428.

Closing
licensed pre-
mises in case
of riot.

By 35 & 36 Vict. c. 94, s. 23, any two justices of the peace acting for any county or place where any riot or tumult happens, or is expected to happen, may order every licensed person in or near the place where such riot or tumult happens, or is expected to happen, to close his premises during any time which the justices may order; and any person who keeps open his premises for the sale of intoxicating liquors during any time at which the justices have ordered them to be closed shall be liable to a penalty not exceeding fifty pounds; and it shall be lawful for any person acting by order of any justices to use such force as may be necessary for the purpose of closing such premises. A conviction under this section must state the time fixed by the justices at which houses may be kept open, and the hour at which the liquor was consumed, and it is not enough to say "at a time declared to be unlawful by an order of the justices" (*k*); but if the proof before the convicting justices was sufficient, such a defect as this may be amended under 12 & 13 Vict. c. 45, s. 7 (*l*).

Hours of
closing
licensed pre-
mises.

By 37 & 38 Vict. c. 49, s. 3, all premises in which intoxicating liquors are sold by retail shall be closed as follows (that is to say):—

- (1.) If situate within the metropolitan district :
 - (a) On Saturday night from midnight until one o'clock in the afternoon on the following Sunday; and
 - (b) On Sunday night from eleven o'clock until five o'clock on the following morning; and
 - (c) On all other days from half an hour after midnight until five o'clock on the same morning; and
- (2.) If situate beyond the metropolitan district and in the metropolitan police district or in a town or in a populous place as defined by this Act :
 - (a) On Saturday night from eleven o'clock until half an hour after noon on the following Sunday; and
 - (b) On Sunday night from ten o'clock until six o'clock on the following morning; and
 - (c) On the nights of all other days from eleven o'clock until six o'clock on the following morning; and
- (3.) If situate elsewhere than in the metropolitan district or the metropolitan police district or such town or populous place as aforesaid :
 - (a) On Saturday night from ten o'clock until half an hour after noon on the following Sunday; and
 - (b) On Sunday night from ten o'clock until six o'clock on the following morning; and
 - (c) On the nights of all other days from ten o'clock until six o'clock on the following morning.

Such premises wherever situate shall, save as hereinafter

Sundays.

(*k*) *Newman v. Hardwicke* (1838), 8 A. & E. 124.

(*l*) See *ante*, p. 706.

mentioned, be closed on Sunday afternoon from three or half-past two according as the hour of opening shall be one o'clock in the afternoon or half an hour after noon until six o'clock.

Such premises wherever situate shall be closed on Christmas Day and Good Friday and on the days preceding Christmas Day and Good Friday respectively, as if Christmas Day and Good Friday were respectively Sunday, and the preceding days were respectively Saturday, but this provision shall not alter the hours during which such premises shall be closed on Sunday when Christmas day immediately precedes or succeeds Sunday. Hours of closing.

By 37 & 38 Vict. c. 49, s. 32, if not inconsistent with the context, the following expressions have the meanings herein-after respectively assigned to them; that is to say,

“The metropolitan district” means the area in that behalf mentioned in the schedule hereto (that is to say), the city of London or the liberties thereof, or any parish or place for the time being subject to the jurisdiction of the metropolitan board of works [now London County Council], or within the area contained within a circle the radius of which is four miles from Charing Cross. “Metropolitan district,” what.

“Town” means an urban sanitary district as described for the purposes of the Public Health Act, 1872; and any collection of houses adjacent to a town as so defined shall, for the purpose of the provisions of this Act with respect to the closing of premises, be deemed to be part of such town after it has been declared so to be by an order of the county licensing committee having jurisdiction in the place where such houses are situated: provided that no urban sanitary district, whether including such adjacent houses or not, shall be deemed a town, unless it contains one thousand inhabitants. “Town,” what.

“Populous place” means any area with a population of not less than one thousand, which by reason of the density of such population the county licensing committee may, by order, determine to be a populous place. At a meeting especially convened for that purpose in manner provided by any regulations in that behalf, or in default of such regulations by the clerk of the peace, as soon as may be after the passing of this Act, and not later than the first day of September, one thousand eight hundred and seventy-four, the county licensing committee shall consider all the cases within their jurisdiction with respect to which it is incumbent upon them to make orders in pursuance of this section, and they shall make orders accordingly, and shall specify therein the boundaries of such towns or populous places. “Populous place,” what.

The county licensing committee may adjourn any meeting held in pursuance of this section, and may also at any subsequent meeting especially convened for that purpose make with respect to any town or populous place within their jurisdiction any like order not restrictive of any order previously made.

Provided that as soon as may be after the publication of each census the county licensing committee shall, at a meeting to be specially convened for the purpose, revise the orders then in force within their jurisdiction, constituting areas either parts of towns or populous places, and may alter or cancel any of the said orders or may make such further orders, if any, as they shall deem necessary to give effect to the provisions of this Act.

Hours of
closing.
Special order
as to hours on
Sunday.

By 37 & 38 Vict. c. 49, s. 6, notwithstanding anything in this or in any local Act contained, the licensing justices may, if they think fit, as respects premises in which intoxicating liquors are sold, when situate in any place beyond the metropolitan district, for the purpose of accommodating the hours of closing on Sunday, Good Friday, and Christmas Day to the hours of public worship in such place, by order direct that such premises shall remain closed until one o'clock in the afternoon instead of half an hour after noon, and in that case such premises shall be closed in the afternoon from three until six o'clock, instead of from half-past two until six o'clock.

Any order made by the licensing justices under this section shall not come into operation until the expiration of one month after the date thereof, and shall be advertised in such manner as the licensing justices direct, and shall be in force until the same is revoked; the expense of any such advertisement may be defrayed in like manner as the expenses of advertising the sittings of such justices are defrayed.

Early-closing
licences.

By sect. 7, where on the occasion of any application for a new licence, or the removal or renewal of a licence which authorises the sale of any intoxicating liquor for consumption on the premises, the applicant applies to the licensing justices to insert in his licence a condition that he shall close the premises in respect of which such licence is or is to be granted one hour earlier at night than that at which such premises would otherwise have to be closed, the justices shall insert the said condition in such licence.

The holder of a licence in which such condition is inserted (in this Act referred to as an early-closing licence) shall close his premises at night one hour earlier than the ordinary hour at which such premises would be closed under the provisions of this Act, and the provisions of this Act and the principal Act shall apply to the premises as if such earlier hour were the hour at which the premises are required to be closed.

The holder of an early-closing licence may obtain from the commissioners of inland revenue any licence granted by such commissioners which he is entitled to obtain in pursuance of such early-closing licence, upon payment of a sum representing six-sevenths of the duty which would otherwise be payable by him for a similar licence not limited to such early closing as aforesaid. In calculating the six-sevenths fractions of a penny shall be disregarded.

Notice of

The notice which a licensed person is required by sect. 11

of the principal Act to keep painted or fixed on his premises shall, in the case of an early-closing licence, contain such words as the licensing justices may order for giving notice to the public that an early-closing licence has been granted in respect of such premises.

By 37 & 38 Vict. c. 49, s. 9, any person who—

During the time at which premises for the sale of intoxicating liquors are directed to be closed by or in pursuance of this Act, sells or exposes for sale in such premises any intoxicating liquor, or opens or keeps open such premises for the sale of intoxicating liquors, or allows any intoxicating liquors although purchased before the hours of closing to be consumed in such premises,—

shall, for the first offence, be liable to a penalty not exceeding ten pounds, and for any subsequent offence to a penalty not exceeding twenty pounds.

Facts (such as persons found drinking in the house when closed) which may be evidence from which the justices may infer a sale in prohibited hours, may, nevertheless, not be sufficient to support a charge of opening or keeping open such house for the sale of liquors during prohibited hours (*m*); and the keeping open alone will not justify a conviction without evidence of some facts to justify the inference that it was for the sale of liquors (*n*). The hours should be regulated according to the mean time of the place where the offence is committed (*o*).

By 37 & 38 Vict. c. 49, s. 30, no person keeping a house licensed under this or the principal Act shall be liable to any penalty for supplying intoxicating liquors, after the hours of closing, to private friends *bonâ fide* entertained by him at his own expense (*p*).

By 37 & 38 Vict. c. 49, s. 10, nothing in this Act or in the principal Act contained shall preclude a person licensed to sell any intoxicating liquor to be consumed on the premises from selling such liquor at any time to *bonâ fide* travellers or to persons lodging in his house: provided, that no person holding a six-day licence shall sell any intoxicating liquor on Sunday to any person whatever not lodging in his house.

Nothing in this Act contained as to hours of closing shall preclude the sale at any time, at a railway station, of intoxicating liquors to persons arriving at or departing from such station by railroad.

If in the course of any proceedings which may be taken

early closing to be painted on door.

Opening licensed premises during hours of closing.

As to *bonâ fide* travellers.

Six-day licences.

Railway stations.

Proof as to

(*m*) *Tennant v. Cumberland* (1859), 1 A. & E. 401; *Jeffrey v. Weaver*, [1899] 2 Q. B. 449; and *Lloyd v. Barnett* (1900), 82 L. T. 804.

(*n*) *Cates v. South* (1859), 1 L. T. N. S. 365; *Overton v. Hunter* (1859), 1 L. T. N. S. 366; *Finch v. Blundell* (1862), 5 L. T. N. S. 672; *Smith v. Feux* (1862), 5 L. T. N. S. 46.

(*o*) *Curtis v. Marsh* (1858), 28 L. J. Ex. 36; *Saunders v. Thomey* (1898), 78 L. T. 627.

(*p*) But customers cannot be converted into guests at the moment the closing time arrives: see *Corbett v. Haigh* (1879), 5 C. P. D. 50

bonâ fide
traveller.

against any licensed person for infringing the provisions of this Act or the principal Act, relating to closing, such person (in this section referred to as the defendant) fails to prove that the person to whom the intoxicating liquor was sold (in this section referred to as the purchaser) is a *bonâ fide* traveller, but the justices are satisfied that the defendant truly believed that the purchaser was a *bonâ fide* traveller; and further, that the defendant took all reasonable precautions to ascertain whether or not the purchaser was such a traveller, the justices shall dismiss the case as against the defendant; and if they think that the purchaser falsely represented himself to be a *bonâ fide* traveller, it shall be lawful for the justices to direct proceedings to be instituted against such purchaser under the twenty-fifth section of the principal Act. (Licensing Act, 1872: 35 & 36 Vict. c. 94.)

Who not to
be deemed a
bonâ fide
traveller.

A person, for the purposes of this Act and the principal Act, shall not be deemed to be a *bonâ fide* traveller unless the place where he lodged during the preceding night is at least three miles distant from the place where he demands to be supplied with liquor, such distance to be calculated by the nearest public thoroughfare.

The term "travellers" includes a person who travels abroad for pleasure or recreation as well as one on business (*r*), but if he went abroad merely because he desired to go to a public-house, he would not be a "traveller" (*r*). The circumstances under which the guest was admitted and supplied would be a matter for consideration in deciding whether the publican *bonâ fide* believed that his customer was a traveller; the length of his stay over liquor at first supplied him would be relevant with reference to subsequent supplies (*r*).

A person who has taken a ticket at a railway station, and is about to start by a train from the station, is a traveller before the train starts (*s*).

This section seems to assume that the onus of proving the exception lies on the defendant, and so alters the law as it stood before (*t*).

Persons found
on premises
during hours
of closing.

By 35 & 36 Vict. c. 94, s. 25, if, during any period during which any premises are required under the provisions of this Act to be closed, any person is found on such premises, he shall, unless he satisfies the court that he was an inmate, servant, or a lodger on such premises, or a *bonâ fide* traveller, or that otherwise his presence on such premises was not in contravention of the provisions of this Act with respect to the closing of licensed premises, be liable to a penalty not exceeding forty shillings.

(*r*) *Taylor v. Humphreys* (1861), 30 L. J. M. C. 242; *Atkinson v. Sellers* (1858), 28 L. J. M. C. 12.

(*s*) *Fisher v. Howard* (1864), 34 L. J. M. C. 42; and see *Williams v. Macdonald*, [1899] 2 Q. B. 308.

(*t*) *Taylor v. Humphries* (1864), 34 L. J. M. C. 1; *Davis v. Scrace* (1869), L. R. 4 C. P. 172; *Morgan v. Hedger* (1870), 40 L. J. M. C. 13.

Any constable may demand the name and address of any person found on any premises during the period during which they are required by the provisions of this Act to be closed, and if he has reasonable ground to suppose that the name or address given is false, may require evidence of the correctness of such name and address, and may, if such person fail upon such demand to give his name or address, or such evidence, apprehend him without warrant, and carry him, as soon as practicable, before a justice of the peace.

Any person required by a constable under this section to give his name and address who fails to give the same, or gives a false name or address, or gives false evidence with respect to such name and address, shall be liable to a penalty not exceeding five pounds.

Persons giving false name or address.

And every person who by falsely representing himself to be a traveller or a lodger buys or obtains, or attempts to buy or obtain at any premises any intoxicating liquor, during the period during which such premises are closed in pursuance of this Act shall be liable to a penalty not exceeding five pounds (*tt*).

Persons falsely representing themselves to be travellers or lodgers.

By 35 & 36 Vict. c. 94, s. 49, where, on the occasion of an application for a new licence or transfer or renewal of a licence which authorizes the sale of any intoxicating liquor for consumption on the premises, the applicant, at the time of his application, applies to the licensing justices to insert in his licence a condition that he shall keep the premises in respect of which such licence is or is to be granted closed during the whole of Sunday, the justices shall insert the said condition in such licence.

As to six-day licences.

The holder of a licence in which such condition is inserted (in this Act referred to as a six-day licence) shall keep his premises closed during the whole of Sunday, and the provisions of this Act with respect to the closing of licensed premises during certain hours on Sunday shall apply to the premises in respect of which a six-day licence is granted as if the whole of Sunday were mentioned in those provisions instead of certain hours only.

The holder of a six-day licence may obtain from the commissioners of inland revenue any licence granted by such commissioners, which he is entitled to obtain in pursuance of such six-day licence, upon payment of six-seventh parts of the duty which would otherwise be payable by him for a similar licence not limited to six days; and if he sell any intoxicating liquor on Sunday he shall be deemed to be selling intoxicating liquor without a licence.

The notice which a licensed person is required to keep painted or fixed on his premises shall, in the case of a licence under this section, contain words indicating that such licence is for six days only. In calculating the amount to be paid for a six-day licence any fraction of a penny shall be disregarded.

(*tt*) 35 & 36 Vict. c. 94, s. 25.

Order granting extension of time for closing.

Special orders of exemption from closing hours.

By 35 & 36 Vict. c. 94, s. 26, the local authority of any licensing district, upon the production of such evidence as such authority may deem sufficient to show that it is necessary or desirable so to do for the accommodation of any considerable number of persons attending any public market, or following any lawful trade or calling [or attending any theatre] (*u*), may grant, if such authority think fit, to any licensed victualler or licensed keeper of a refreshment-house [or any person licensed to sell beer or cider by retail to be consumed on the premises] (*v*), in respect of premises in the immediate neighbourhood of such market, or of the place where the persons follow such lawful trade or calling [or of any such theatre], an order exempting such person from the provisions of this Act, with respect to the closing of his premises on such days and during such time, except between the hours of one and two of the clock in the morning, as may be specified in such order.

The holder of an order under this section shall not be liable to any penalty for not closing his premises on such days and during such times as may be specified in such order; but he shall not be exempt from any other penalty under this or any other Act, or otherwise.

A notice in such form as may be prescribed by the local authority, stating the day and hours during which the premises are permitted to be open under such order of exemption shall be affixed and kept affixed in a conspicuous position outside the premises; and if the holder of the order of exemption make default in affixing or in keeping affixed such notice in manner aforesaid, during any part of the time for which his exemption is granted, he shall be liable to pay a penalty not exceeding five pounds.

Every person who keeps affixed to his premises any such notice when he does not hold an order under this section, shall be liable to a penalty not exceeding ten pounds.

Any such local authority as aforesaid may at any time, if it seem fit to them, withdraw an order under this section, or alter the same by way of extension or restriction, as such authority may deem necessary or expedient, so however as not to render any person liable to any penalty for anything done under such order before the holder was informed of such withdrawal or alteration.

Local authorities of licensing districts.

The following persons and bodies of persons shall be deemed to be local authorities of licensing districts for the purposes of this Act; that is to say,

- (1.) In the metropolitan police district, the commissioner of police for the metropolis, subject to the approbation of one of her Majesty's principal secretaries of state:

(*u*) The exemption in favour of premises near a theatre is repealed by 37 & 38 Vict. c. 49, s. 4.

(*v*) Added by 37 & 38 Vict. c. 49, s. 5.

(2.) In the city of London and the liberties thereof, so far as they are not included in the metropolitan police district, the commissioner of city police, subject to the approbation of the lord mayor of the said city :

(3.) In any other place, two justices of the peace in petty sessions assembled.

By 35 & 36 Vict. c. 94, s. 27, no intoxicating liquor shall be consumed upon premises licensed as a refreshment-house but not for the sale of any intoxicating liquor during the hours during which the same premises would, if they were the licensed premises of licensed victuallers, be closed by law for the sale and consumption of intoxicating liquor.

Hours of closing for refreshment-houses.

If any person licensed to keep such refreshment-house allows any intoxicating liquor to be consumed on the premises in contravention of this section, he shall be liable for the first offence to a penalty not exceeding ten pounds, and for any subsequent offence to a penalty not exceeding twenty pounds.

By 35 & 36 Vict. c. 94, s. 28, every refreshment-house in respect of which a licence is granted for the sale therein by retail of foreign wine, upon which licence an abatement of duty has been allowed under section nine of the Act of the session of the twenty-fourth and twenty-fifth years of the reign of her present Majesty, chapter ninety-one, intituled "An Act to amend the Laws relating to the Inland Revenue," shall be closed every night at ten of the clock, and if any person keeping any such refreshment-house as is mentioned in this section sells or exposes for sale in such refreshment-house, or opens, or keeps open any such refreshment-house for the sale of intoxicating liquors during the time that such house is directed to be closed by this section, or during such time as aforesaid allows any intoxicating liquor to be consumed on such premises, he shall for the first offence be liable to a penalty not exceeding ten pounds, and for any subsequent offence to a penalty not exceeding twenty pounds.

By sect. 29, if any licensed victualler or keeper of a refreshment-house in which intoxicating liquors are sold [or any person licensed to sell beer or cider by retail to be consumed on the premises] (x) applies to the local authority of a licensing district for a licence exempting him from the provisions of this Act relating to closing of premises on any special occasion or occasions, it shall be lawful for such local authority, if in his discretion he thinks fit so to do, to grant to the applicant an occasional licence exempting him from the provisions of this Act relating to closing of premises during certain hours, and on the special occasion or occasions to be specified in the licence ; and no licensed victualler or keeper of a refreshment-house [or any person licensed to sell beer or cider by retail to be consumed on the premises] (x) to whom an occasional licence has been granted under this section shall

Special occasional licences.

(x) Added by 37 & 38 Vict. c. 49, s. 5.

be subject to any penalty for the contravention of the provisions of this Act relating to the closing of premises during the time to which his occasional licence extends, but he shall not be exempted by such occasional licence from any penalty to which he may be subject by any other provision of this or any other Act of Parliament.

Hours of
closing re-
freshment-
houses.

By 37 & 38 Vict. c. 49, s. 11, whereas by the Act of the session of the twenty-seventh and twenty-eighth years of the reign of her present Majesty, chapter sixty-four, it is provided that no persons within the limits of that Act shall open or keep open any refreshment-house, to which that Act so far as it is unrepealed applies, or sell or expose for sale or consumption in any such refreshment-house any refreshments or any article whatsoever between the hours of one and four o'clock in the morning: and whereas it is expedient to amend the provisions of the said Act: be it therefore enacted, that the said Act, so far as it is unrepealed, shall be construed as if there were substituted therein for the hour of one o'clock in the morning the hour of the night or morning at which premises licensed for the sale of intoxicating liquors by retail situate in the same place as such refreshment-house are required to be closed, and as if the whole of England were within the limits of the Act.

Record of
convictions
and penalties.

By 37 & 38 Vict. c. 49, s. 12, the sixty-seventh section of the principal Act is hereby repealed, and in lieu thereof be it enacted, that where any person holding a licence under this or the principal Act is convicted of any offence against this or the principal Act, or against any of the Acts recited or mentioned therein, the court may not, except in the case of a first offence, reduce the penalty to less than twenty shillings, nor shall the penalty, whether of excise or police, be reduced in any case to less than the minimum authorized by any other Act.

Mitigation of
penalties
limited.

Recording
conviction for
adulterating,
&c. drink.

By sect. 14, where a licensed person is convicted of any offence against the provisions of any Act for the time being in force relating to the adulteration of drink, such conviction shall be entered in the proper register of licences.

Convictions to
be recorded
against the
premises.

By sect. 31, the following additional provision shall be enacted with respect only to convictions of persons who may hereafter become licensed in respect of premises, and shall not apply to a conviction of any person licensed for any premises at the passing of this Act so long as he is licensed in respect of the same premises; viz.,

(3.) If the licences of two such persons licensed in respect of the same premises are forfeited within any period of two years, the premises shall be disqualified for one year from the date of the last forfeiture:

Provided that, where any premises are disqualified under this section, notice of such disqualification shall be served upon the owner of the premises in like manner as an order of disqualification is required to be served under this Act, and the regula-

tions for the protection of the owner of premises in case of an order of disqualification shall, so far as the same are applicable, extend to the case of disqualification under this section.

By the Licensing Act, 1902 (2 Edw. 7, c. 28), s. 9, it is enacted:

- (1.) Where any licensed person is convicted before any court of any offence committed by him as such, it shall be the duty of the clerk of the licensing justices to enter notice of every such conviction, in the form prescribed by the secretary of state in the register of licences kept by him, and if the clerk of the court is not the clerk of the licensing justices, he shall forthwith send notice of the conviction to the clerk of the licensing justices. Convictions to be recorded in register.
- (2.) On any application for the grant, renewal, or transfer of a licence, the licensing justices shall have regard to any entries in the register of licences relating either to the person by whom, or to the premises in respect of which, the licence is to be held.
- (3.) When a conviction relating to any premises is entered in the register of licences, it shall be the duty of the clerk of the licensing justices to serve in manner provided by the Licensing Act, 1872, notice of the conviction on the owner of the premises.
- (4.) After the commencement of this Act no conviction shall be recorded on the licence.

By 35 & 36 Vict. c. 94, s. 32, a conviction for any offence under this Act shall not after five years from the date of such conviction be receivable in evidence against any person for the purpose of subjecting him to an increased penalty or to any forfeiture. Conviction after five years not to affect penalty.

By sect. 36, there shall be kept in every licensing district by the clerk of the licensing justices of that district a register, to be called the register of licences, in such form as may be prescribed by such justices, containing the particulars of all licences granted in the district, the premises in respect of which they were granted, the names of the owners of such premises, and the names of the holders for the time being of such licences. There shall also be entered on the register all forfeitures of licences, disqualifications of premises, records of convictions, and other matters relating to the licences on the register. Register of licences.

Every person applying for a new licence, or the renewal of a licence, shall state the name of the owner of the premises in respect of which such licence is granted or renewed, and such name shall be endorsed on the licence, and the person whose name is so stated shall, subject as hereinafter mentioned, be deemed for the purposes of this Act to be the owner of the premises.

A court of summary jurisdiction may, on the application of any person who proves to the court that he is entitled to be

Register of
licences.

entered as owner of any premises in place of the person appearing on the register to be the owner, make an order substituting the name of the applicant, and such order shall be obeyed by the clerk of the licensing justices, and a corresponding correction may be directed to be made on the licence granted in respect of the premises of which such applicant claims to be the owner.

Any ratepayer, any owner of premises to which a licence is attached, and any holder of a licence within a licensing district, shall, upon payment of a fee of one shilling, and any officer of police, and any officer of inland revenue in such district, without payment, shall be entitled at any reasonable time to inspect and take copies of or extracts from any register kept in pursuance of this section for such district; and the clerk of the licensing justices and every other person who prevents the inspection or taking copies of or extracts from the same, or demands any unauthorized fee therefor, shall be liable to a penalty not exceeding five pounds for each offence.

The licensing justices may, if they think fit, cause the register kept in pursuance of this section to be divided into parts and assign a part to any portion of the licensing district; and there shall be paid by each licensed person to the clerk in respect of such registration the sum or fee of one shilling for every licence granted or renewed. These registers are made evidence by sect. 58, see *post*, p. 775.

By 37 & 38 Vict. c. 49, s. 15, where any licensed person is convicted for the first time of any one of the following offences,—

- (1.) Making an internal communication between his licensed premises and any unlicensed premises;
- (2.) Forging a certificate under the Wine and Beerhouse Acts, 1869 and 1870;
- (3.) Selling spirits without a spirit licence;
- (4.) Any felony;

Owner of pre-
mises may
apply for
temporary
authority to
carry on busi-
ness, when.

and in consequence either becomes personally disqualified or has his licence forfeited, there may be made by or on behalf of the owner of the premises an application to a court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions for licensing purposes, and a further application to such next special sessions for the grant of a licence in respect of such premises, and for this purpose the provisions contained in the Alehouse Act, 1828, with respect to the grant of a temporary authority and to the grant of licences at special sessions, shall apply as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee.

Who entitled
to be regis-
tered as
owner.

By sect. 29, any person possessing an estate or interest in premises licensed for the sale of intoxicating liquors, whether as owner, lessee or mortgagee, prior or paramount to that of the immediate occupier, shall, on payment of a fee of one

shilling to the clerk of the licensing justices, be entitled to be registered as owner or one of the owners of such premises: provided, that when such estate or interest is vested in two or more persons jointly, one only of such persons shall be registered as representing such estate or interest.

By sect. 48 of the Licensing Act, 1872, the commissioners of inland revenue may alter the form of any licence granted by them for the sale of intoxicating liquors, in such manner as they may think expedient, for the purposes of bringing such form into conformity with the law for the time being in force.

By 37 & 38 Vict. c. 49, s. 16, any constable may, for the purpose of preventing or detecting the violation of any of the provisions of the principal Act or this Act which it is his duty to enforce, at all times enter on any licensed premises, or any premises in respect of which an occasional licence is in force (*x*).

Regulations
as to entry on
premises.

Every person who, by himself, or by any person in his employ or acting by his direction or with his consent, refuses or fails to admit any constable in the execution of his duty demanding to enter in pursuance of this section, shall be liable to a penalty not exceeding for the first offence five pounds, and not exceeding for the second and every subsequent offence ten pounds.

Refusing to
admit con-
stable.

An outhouse used as a cellar at one side of a yard adjoining to the house and occupied therewith, though without any internal occupation, would be deemed part of the premises within this section (*y*).

By 37 & 38 Vict. c. 49, s. 17, any justice of the peace, if satisfied by information on oath that there is reasonable ground to believe that any intoxicating liquor is sold by retail or exposed or kept for sale by retail at any place within his jurisdiction, whether a building or not, in which such liquor is not authorized to be sold by retail, may in his discretion grant a warrant under his hand, by virtue whereof it shall be lawful for any constable named in such warrant, at any time or times within one month from the date thereof, to enter, and if need be by force, the place named in the warrant, and every part thereof, and examine the same and search for intoxicating liquor therein, and seize and remove any intoxicating liquor found therein which there is reasonable ground to suppose is in such place for the purpose of unlawful sale at that or any other place, and the vessels containing such liquor; and in the event of the owner or occupier of such premises being convicted of selling by retail or exposing or keeping for sale by retail any liquor which he is not authorized to sell by retail, the intoxicating liquor so seized and the vessels containing such liquor shall be forfeited.

Warrant to
search for in-
toxicating
liquors.

(*x*) A constable cannot under this part of the section demand admission unless he has reasonable grounds for suspecting a violation of such Acts is taking place on the premises: *Duncan v. Dowding*, [1897] 1 Q. B. 575.

(*y*) See *R. v. Tott* (1861), 30 L. J. M. C. 177, decided on 4 & 5 Will. 4, c. 85, s. 7, now repealed.

When a constable has entered any premises in pursuance of any such warrant as is mentioned in this section, and has seized and removed such liquor as aforesaid, any person found at the time on the premises shall, until the contrary is proved, be deemed to have been on such premises for the purpose of illegally dealing in intoxicating liquor, and be liable to a penalty not exceeding forty shillings.

Any constable may demand the name and address of any person found on any premises on which he seizes or from which he removes any such liquor as aforesaid, and if he has reasonable ground to suppose that the name or address given is false may examine such person further as to the correctness of such name and address, and may, if such person fail upon such demand to give his name or address, or to answer satisfactorily the questions put to him by the constable, apprehend him without warrant and carry him as soon as practicable before a justice of the peace.

Any person required by a constable under this section to give his name and address who fails to give the same, or gives a false name or address, or gives false information with respect to such name and address, shall be liable to a penalty not exceeding five pounds.

Selling liquors
in booths,
tents, at fairs
or races.

By 37 & 38 Vict. c. 49, s. 18, any person selling or exposing for sale any intoxicating liquor in any booth, tent or place within the limits of holding any lawful and accustomed fair or any races without an occasional licence authorizing such sale shall, notwithstanding anything contained in any Act of Parliament to the contrary, be deemed to be a person selling or exposing for sale by retail intoxicating liquor at a place where he is not authorized by his licence to sell the same, and be punishable accordingly.

Provided that this section shall not apply to any person selling or exposing for sale intoxicating liquors in premises in which he is duly authorized to sell the same throughout the year, although such premises are situate within the limits aforesaid.

Hours of
closing for
occasional
licences.

By sect. 19, whereas by the twentieth section of the Act of the session of the twenty-sixth and twenty-seventh years of the reign of her present Majesty, chapter thirty-three, it is provided that the hours during which an occasional licence shall authorize the sale of any beer, spirits or wine shall extend from sunrise until one hour after sunset: it is enacted, that the said section shall be construed as if in place of the words "sunrise until one hour after sunset" there were inserted the words "such hour not earlier than sunrise until such hour not later than ten o'clock at night as may be specified in that behalf in the consent given by the justice for the granting of such occasional licence."

By sect. 20, for the purpose of so much of the principal Act as relates to offences against public order, that is to say, sections twelve to eighteen, both inclusive, and the sections

for giving effect to the same, a person taking out an occasional licence shall be deemed to be a licensed person within the meaning of the said sections, and the place in which any intoxicating liquors are sold in pursuance of the occasional licence shall be deemed to be licensed premises, and to be the premises of the person taking out such licence.

By sect. 32, "occasional licence" means a licence to sell beer, spirits or wine granted in pursuance of the thirteenth section of the Act passed in the twenty-fifth and twenty-sixth years of the reign of her present Majesty, chapter twenty-two, and section five of the Act of the twenty-seventh year of the reign of her present Majesty, chapter eighteen, and the Acts amending the same in relation to the licences therein mentioned, or of any of such Acts.

"Occasional licence," what.

By 35 & 36 Vict. c. 94, s. 51, except as in this Act otherwise expressly provided, every offence under this Act may be prosecuted, and every penalty and forfeiture may be recovered and enforced, in manner provided by the Summary Jurisdiction Act, 1848, subject to the following provisions:—

Proceedings before court of summary jurisdiction.

- (1.) The court of summary jurisdiction, when hearing and determining an information or complaint, other than in a case where the offence charged is that of being found drunk in any highway or other public place, or any licensed premises, shall be constituted either of two or more justices of the peace in petty sessions sitting at a place appointed for holding petty sessions [*i.e.*, of the county, and need not be residing in the petty sessional division] (z), or of a stipendiary magistrate, or some other officer for the time being empowered by law to do alone any Act authorized to be done by more than one justice of the peace, and sitting alone or with others at some court or other place appointed for the administration of justice:

Court of summary jurisdiction defined.

[Sects. (2) and (3) and part of sect. (4) are repealed by 47 & 48 Vict. c. 43, Schedule.]

In all cases of summary proceedings under this Act, the defendant and his wife shall be competent to give evidence:

Defendant and his wife to be competent witnesses.

- (5.) All forfeitures shall be sold or otherwise disposed of in such manner as the court may direct, and the proceeds of such sale or disposal (if any) shall be applied in the like manner as penalties, but the court may direct that such proceeds may be applied in the first instance in paying the expenses of and incidental to any search and seizure which resulted in such forfeiture:
- (6.) Penalties and forfeitures under this Act shall not, for

(z) See *R. v. Shaw* (1865), 34 L. J. M. C. 169.

the purpose of any Act respecting the application of such penalties, or the costs, charges and expenses attending proceedings for recovery of such penalties or of forfeitures be deemed to be penalties or forfeitures under any Act relating to the inland revenue.

Any officer appointed by the commissioners of inland revenue may sue for any penalties under this Act, and when so sued for any penalties which may be recovered shall be applied in the manner in which excise penalties are for the time being applicable by law.

Where under this Act any sum for costs (other than costs upon a conviction or order of dismissal of an information) or for compensation, or both, is ordered or awarded to be paid by any person, the amount thereof shall be recovered in manner directed by the Summary Jurisdiction Act, 1848, for the recovery of costs awarded upon the dismissal of an information or complaint.

Of appeals
against orders
or summary
convictions.

By 35 & 36 Vict. c. 94, s. 52, if any person feels aggrieved by any order or conviction made by a court of summary jurisdiction, the person so aggrieved may appeal therefrom, subject to the conditions and regulations following:—

To what
sessions.

(1.) The appeal shall be made to the next court of quarter sessions. [The remainder of this section was repealed by the Summary Jurisdiction Act, 1884 (47 & 48 Vict. c. 43), and the procedure as to appeals against summary convictions and orders under the Licensing Acts is now regulated by the Summary Jurisdiction Acts, 1879 (42 & 43 Vict. c. 49), 1884 (47 & 48 Vict. c. 43), and the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 13 (11).]

For procedure on appeals under these Acts, see *post*, p. 816.

Excise licence
pending
appeal.

By 35 & 36 Vict. c. 94, s. 53, where the justices refuse to renew a licence, and an appeal against such refusal is duly made, and such licence expires before the appeal is determined, the commissioners of inland revenue may, by order, permit the person whose licence is refused to carry on his business during the pendency of the appeal upon such conditions as they think just; and, subject to such conditions, any person so permitted may, during the continuance of such order, carry on his business in the same manner as if the renewal of the licence had not been refused.

Where a licence is forfeited on or in pursuance of a conviction for an offence, and an appeal is duly made against such conviction, the court by whom the conviction was made may, by order, grant a temporary licence to be in force during the pendency of the appeal upon such conditions as they think just.

By sect. 54, no conviction or order made in pursuance of this Act, originally or on appeal, relative to any offence, penalty, forfeiture, or summary order, shall be quashed for want of form, or, if made by a court of summary jurisdiction,

be removed by *certiorari* or otherwise, either at the instance of the Crown or of any private party, into any superior court.

By 35 & 36 Vict. c. 94, s. 56, where any tenant of any licensed premises is convicted of an offence against this Act, and such offence is one the repetition of which may render the premises liable to be disqualified from receiving a licence for any period, it shall be the duty of the clerk of the licensing justices to serve, in manner provided by the Act, notice of every such conviction on the owner of the premises.

Where any order of a court of summary jurisdiction declaring any licensed premises to be disqualified from receiving a licence for any period has been made, the court shall cause such order to be served on the owner of such premises, where the owner is not the occupier, with the addition of a statement that the court will hold a petty sessions at a time and place therein specified, at which the owner may appear and appeal against such order on all or any of the following grounds, but on no other grounds:

- (a) That notice, as required by this Act, has not been served on the owner of a prior offence which on repetition renders the premises liable to be disqualified from receiving a licence at any period; or
- (b) That the tenant by whom the offence was committed held under a contract made prior to the commencement of this Act, and that the owner could not legally have evicted the tenant in the interval between the commission of the offence, in respect of which the disqualifying order was made, and the receipt by him of the notice of the immediately preceding offence which on repetition renders the premises liable to be disqualified from receiving a licence at any period; or
- (c) That the offence in respect of which the disqualifying order was made occurred so soon after the receipt of such last-mentioned notice that the owner, notwithstanding he had legal power to evict the tenant, could not with reasonable diligence have exercised that power in the interval which occurred between the said notice and the second offence.

If the owner appear at the time and place specified, and at such sessions, or any adjournment thereof, satisfy the court that he is entitled to have the order cancelled on any of the grounds aforesaid, the court shall thereupon direct such order to be cancelled, and the same shall be void.

By sect. 58, the registers of licences kept in pursuance of this Act shall be receivable in evidence of the matters required by this Act to be entered therein. Every copy of an entry made in the registers of licences in pursuance of this Act, purporting to be signed by the clerk to the licensing justices and (in the case of a copy) to be certified to be a true copy, shall be evidence of the matters stated in such entry, without

Certiorari
taken away.

Notice of con-
viction to be
given to
owner of pre-
mises.

Order dis-
qualifying
premises to be
served on the
owner.

Registers of
licences to be
evidence.

proof of the signature or authority of the person signing the same.

By sect. 59, nothing in this Act shall prevent any person from being liable to be indicted or punished under any other Act, or otherwise, so that he be not punished twice for the same offence.

Disqualifica-
tion of justice
from acting.

By sect. 60, no justice shall act for any purpose under this Act, or under any of the Intoxicating Liquor Licensing Acts, except in cases where the offence charged is that of being found drunk in any highway or other public place, whether a building or not, or on any licensed premises, or of being guilty while drunk of riotous or disorderly conduct, or of being drunk while in charge, on any highway or other public place, of any carriage, horse, cattle, or steam-engine, or of being drunk when in possession of loaded fire-arms, who is or is in partnership with or holds any share in any company which is a common brewer, distiller, maker of malt for sale, or retailer of malt or of any intoxicating liquor in the licensing district, or in the district or districts adjoining to that in which such justice usually acts; and no justice shall act for any purpose under this Act, or under any of the Intoxicating Liquor Acts, in respect of any premises in the profits to which such justice is interested, or of which he is wholly or partly the owner, lessee or occupier, or for the owner, lessee or occupier of which he is manager or agent.

By the Licensing Act, 1902 (2 Edw. 7, c. 28), s. 12, it is enacted that a justice shall not be disqualified to act for any purpose under the Licensing Acts, 1828 to 1886, or this Act, by reason only of his being interested in a railway company which is a retailer of intoxicating liquor.

Penalty on
disqualified
justice who
acts.

Any justice hereby declared not to be qualified to act under this Act who knowingly acts as a justice for any of the purposes of this Act shall for every such offence be liable to a penalty not exceeding one hundred pounds, to be recovered by action in one of his Majesty's superior courts at Westminster.

Provided that—

- (1.) No justice shall be disqualified under this section to act in respect of any premises by reason of his having vested in him a legal interest only, and not a beneficial interest, in such premises or the profits thereof:
- (2.) No justice shall be liable to a penalty for more than one offence committed by him under this section before the institution of any proceedings for the recovery of such penalty:
- (3.) No act done by any justice disqualified by this section shall by reason only of such disqualification be invalid.

Places within
the jurisdic-
tion of jus-
tices, &c.

By sect. 61 of 35 & 36 Vict. c. 94, for all the purposes of this Act, any pier, quay, jetty, mole, or work extending from any place within the jurisdiction of any licensing justices or court

of summary jurisdiction into or over any part of the sea, or any part of a river within the ebb and flow of the tide, shall be deemed to be within the jurisdiction of such justices and court.

For the purpose of jurisdiction in any proceedings under this Act, any river or water which runs between or forms the boundary of two or more licensing districts, or of the jurisdiction of two or more courts of summary jurisdiction, shall be deemed to be wholly within each such licensing district and the jurisdiction of each of such courts.

By sect. 64, every holder of a licence, or of an order of exemption made by a local authority in pursuance of this Act, shall, by himself, his agent, or servant, produce such licence or order within a reasonable time after the production thereof is demanded by a justice of the peace, constable, or officer of inland revenue, and deliver the same to be read and examined by him. Any person who acts in contravention of this section shall be liable to a penalty not exceeding ten pounds.

Production of licence by holder or his servant on demand.

By sect. 70, all notices and documents required by this Act to be served or sent may, unless otherwise expressly provided, be served and sent by post, and, until the contrary is proved, shall be deemed to have been served and received respectively at the time when the letter containing the same would be delivered in the ordinary course of post; and in proving such service or sending it shall be sufficient to prove that the letter containing the notice or document was prepaid, and properly addressed.

Notices may be sent by post.

Where any officer or other person interested in any licensed premises is entitled to receive notice of a conviction under this Act, he shall supply his address to the clerk or other person required to send such notice, and any notice sent to such address shall be deemed to be duly served; and where no notice is supplied in pursuance of this section, all notices shall be deemed to be duly served if sent to any address which such clerk or other person in the exercise of his discretion believes to be the address of the person to whom the notice was so sent.

Provided that any notice of any offence required by this Act to be sent to the owner of licensed premises shall be either served personally or sent by registered letter.

Service of notice on owner of licensed premises.

By sect. 72, nothing in this Act shall affect or apply to—

- (1.) The privileges at the date of the passing of this Act enjoyed by any university in England, or the respective chancellors or scholars of the same, or their successors:
- (2.) The privileges at the date of the passing of this Act enjoyed by the mayor or burgesses of the borough of St. Alban's, in the county of Hertford, or their successors, or the exemption from the obligation to take out a licence as defined by this Act, or a licence from the commissioners of inland revenue enjoyed

Matters excluded from the Licensing Act, 1872.

by the company of the master, wardens, and commonalty of vintners of the city of London :

- (3.) The sale of spruce or black beer :
- (4.) The sale of intoxicating liquor by proprietors of theatres in pursuance of the Acts in that behalf :
- (5.) The sale of intoxicating liquor in packet boats, in pursuance of the Acts in that behalf :
- (6.) The sale of intoxicating liquor on special occasions in pursuance of the provisions in that behalf enacted :
- (7.) The sale of spirits in canteens, in pursuance of any Act regulating the same :
- (8.) The sale of medicated or methylated spirits, or spirits made up in medicine and sold by medical practitioners or chemists and druggists :
- (9.) The sale of intoxicating liquor by wholesale :
- (10.) Any penalties recoverable by or on behalf of the commissioners of inland revenue, or any laws relating to the excise.

Definitions in the Licensing Act, 1872.

By 35 & 36 Vict. c. 94, s. 74, in this Act, if not inconsistent with the context, the following expressions have the meanings hereinafter respectively assigned to them; that is to say,

“Intoxicating Liquor Licensing Act, 1828,” means the Act of the ninth year of the reign of King George the Fourth, chapter sixty-one, intituled “An Act to regulate granting of Licences to Keepers of Inns, Alehouses and Victualling Houses in England,” and includes the Acts amending the same :

“Wine and Beerhouse Acts” means the Wine and Beerhouse Act, 1869, and the Wine and Beerhouse Act Amendment Act, 1870 :

“Intoxicating Liquors Licensing Acts” means the Intoxicating Liquor Licensing Act, 1828, and the Wine and Beerhouse Acts :

“Intoxicating liquor” means spirits, wine, beer, porter, cider, perry, and sweets, and any fermented, distilled, or spirituous liquor which cannot, according to any law for the time being in force, be legally sold without a licence from the commissioners of inland revenue :

“Licence” means a licence for the sale of intoxicating liquors granted by justices in pursuance of the Intoxicating Liquor Licensing Act, 1828, including a certificate of justices granted under the Wine and Beerhouse Acts, and including a licence for the sale of sweets which is hereby authorized to be granted in the same manner as if sweets were wine, and including a licence for the retail of spirits granted to a wholesale spirit dealer by the justices in pursuance of this Act :

“A new licence” means a licence granted at a general annual licensing meeting in respect of premises not heretofore licensed for the sale of intoxicating liquors :

- “The renewal of a licence” means a licence granted at a general annual licensing meeting by way of renewal :
- “The transfer of a licence” means a transfer made in special sessions in exercise of the power granted to justices by the fourth section of the said Act of the ninth year of the reign of King George the Fourth, chapter sixty-one, intituled “An Act to regulate granting of Licences to Keepers of Inns, Alehouses, and Victualling Houses in England :”
- “Licensed person” means a person holding a licence as defined by this Act :
- “Licensed premises” means premises in respect of which a licence as defined by this Act has been granted and is in force :
- “Unlicensed premises” means premises in respect of which a licence as defined by this Act has not been granted or is not in force :
- “Owner of licensed premises” means the person for the time being entitled to receive, either on his own account or as mortgagee or other incumbrancer in possession, the rack-rent of such premises :
- “Licensing district” means the area for which a general annual licensing meeting is held in pursuance of the Intoxicating Liquor Licensing Act, 1828 :
- “Licensing justices” means the justices having jurisdiction in respect of the grant of new licences in a licensing district under the last-mentioned Act as amended by this Act :
- “Licensing officer” means any officer appointed by the commissioners of inland revenue to issue or superintend the issue of licences under this Act in any place :
- “Sale by retail” in respect of any intoxicating liquor means the sale of that liquor in such quantities as is declared to be sale by retail by any Acts relating to the sale of intoxicating liquors :
- “County” does not include a county of a city or a county of a town, but means any county, riding, parts, division or liberty of a county having a separate commission of the peace and a separate court of quarter sessions :
- “Borough” means a county of a city, county of a town, city, municipal borough, cinque port and its liberties, town corporate or other place in which a general annual licensing meeting is held in pursuance of the Intoxicating Liquors Licensing Act, 1828, exclusive of a petty sessional division of a county :
- Where a liberty of a county, as defined by this Act, is not divided into petty sessional divisions, such liberty shall, so far as respects the provisions of this Act with respect to the grant of new licences, stand in the same position as if it were a petty sessional division of the county in

Definition
clause in
Licensing
Act, 1872.

which it is geographically situate, or with which it has the longest common boundary :

“Clerk of the licensing justices” means, where the licensing district is a county or a petty sessional division of a county, the clerk of the petty sessions for such division ; and where the licensing district is a county of a city, county of town, city, municipal borough, town corporate, or other place not a county or a petty sessional division of a county, means the clerk to the justices of such county of a city, county of a town, city, borough, town corporate, or place, or other person performing analogous duties to such clerk ; and where there are more persons than one in any county, petty sessional division, or other place filling the office of clerk of the licensing justices as hereinbefore defined, the licensing justices shall determine by which of such persons the register of licences shall be kept :

“Town” means any parliamentary or municipal borough, Improvement Act district, local government district, or other place having a known legal boundary, and wherever two or more of the above-mentioned places occupy portions of the same area, “town” shall be taken to mean such one of such places as is the largest in area ; and any premises situate in more than one town shall, for the purposes of this Act, be deemed to be in such one of the towns as is the largest in area (*a*) :

“Local government district” means any area subject to the jurisdiction of a local board constituted in pursuance of the Local Government Act, 1858 :

“Improvement Act district” means any area for the time being subject to the jurisdiction of any commissioners, trustees, or other persons intrusted by any local Act, not being a Turnpike Act or Highway Act, with powers of improving, cleansing, or paving any part of such district :

“Secretary of state” means one of his Majesty’s principal secretaries of state.

By 35 & 36 Vict. c. 94, s. 48, the following regulations shall be made with respect to licences :—

(1.) Every licence granted after the commencement of this Act shall be in such form as may from time to time be prescribed by a secretary of state : provided that licences granted at any general annual licensing meeting or adjournment thereof between the 20th of August and end of September, 1872, shall be in the forms heretofore in use, but any conditions contained in any licence so granted which are contrary to the provisions of this Act shall be of no effect.

(2.) A renewal of a licence may be made by an indorsement

As to the
form of li-
cences.

(*a*) This is repealed so far as respects the closing, and of a new licence.

on the licence, or by the issue of a copy of the old licence, but in the latter case there shall be indorsed on such copy all convictions made within the previous five years which are indorsed on the old licence.

The commissioners of inland revenue may alter the form of any licence granted by them for the sale of intoxicating liquors in such manner as they may think expedient for the purposes of bringing such form into conformity with the law for the time being in force.

CHAPTER IX.

OF BILLIARD LICENCES—AND OFFENCES AGAINST THE
GAMING ACT RELATING THERETO—AND APPEALS
THEREUNDER.

BILLIARD licences are granted under 8 & 9 Vict. c. 109, and by sect. 12 of that Act every person licensed under that Act who shall be convicted before a police magistrate, or two justices acting in and for the division or place in which shall be situated the house kept or heretofore kept by such person, of any offence against the tenor of the licence to him granted, shall be liable to the same penalties and punishments in the case of a first, second, or third offence respectively, to which persons licensed under 9 Geo. 4, c. 61, are respectively liable, on conviction of a first, second, or third offence against the tenor of the licence granted to them under the last-recited Act, or as near thereunto as the nature of the case will allow (subject now to 35 & 36 Vict. c. 94, s. 75, *ante*, p. 744); and all the provisions of the last-recited Act, with respect to convictions and penalties for offences against the last-recited Act (as amended by 35 & 36 Vict. c. 94 (*a*)), and the proceedings for enforcing the same, and the expenses of prosecution and penalties on witnesses for not attending, and the recovery and application of penalties, and the proceedings on appeals against convictions, and the award of costs on appeals and in actions against justices, constables, or other persons for anything done in the execution of the last-recited Act, shall be deemed to apply, so far as they are applicable, to convictions for offences against the tenor of the licences granted under this Act, and to the proceedings consequent thereupon or connected therewith, as if they were herein enacted.

An appeal is given to quarter sessions by sect. 20 of 8 & 9 Vict. c. 109, which enacts, that “any person who shall be summarily convicted under this Act may appeal to the next general or quarter sessions of the peace to be holden for the county or place wherein the cause of complaint shall have arisen, provided that such person at the time of the conviction, or within

Appeal
against
summary
convictions
under this
Act.

(a) See sect. 75, *ante*, p. 744.

forty-eight hours thereafter, shall enter into a recognizance with two sufficient sureties, conditioned personally to appear at the said sessions to try such appeal, and to abide the further judgment of the court at such sessions, and to pay such costs as shall by the last-mentioned court be awarded; and it shall be lawful for the magistrate or justices by whom such conviction shall have been made, to bind over the witnesses who shall have been examined in sufficient recognizances to attend and be examined at the hearing of such appeal: and that every such witness, on producing a certificate of being so bound, under the hand of the said magistrate or justices, shall be allowed compensation for his or her time, trouble, and expenses in attending the appeal, which compensation shall be paid, in the first instance, by the treasurer of the county or place in like manner as in cases of misdemeanour under 7 Geo. 4, c. 64, and in case the appeal shall be dismissed, and the order of conviction affirmed, the reasonable expenses of all such witnesses attending as aforesaid, to be ascertained by the court, shall be repaid to the said treasurer by the appellant.

Recognizances to be entered into.

The above appeal clause does not, however, give an appeal against a refusal by justices to grant a billiard licence, nor can 9 Geo. 4, c. 61, be so read with it as to give such appeal (b).

No appeal against a refusal to grant a billiard licence.

(b) *Ex parte Chamberlain* (1857), 8 E. & B. 644.

CHAPTER X.

APPEALS AGAINST CONVICTIONS OR ORDERS.

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1. <i>Of Summary Convictions and Orders generally</i>	784
2. <i>Of Appeals against them</i>	816

SECTION 1.

OF SUMMARY CONVICTIONS AND ORDERS BY JUSTICES IN GENERAL.

A SUMMARY conviction is a record of the proceedings had under the authority of a penal statute, before some justice or commissioner duly authorized to receive information, and proceed to judgment. But the term “conviction” is *verbum equivocum* (a); that is, in common parlance it is taken to mean the verdict at the time of trial; though in strict legal sense it is used to denote the judgment of the court.

Distinction
between
convictions
and orders.

The distinction between orders and convictions has ceased to be of importance since 11 & 12 Vict. c. 43, which statute has placed them almost completely on the same footing so far as it applies. One of the marks of distinction formerly was, that an order did not require to have the facts necessary to found jurisdiction and to support it to be set out in the body of it, whilst a conviction did (b). So an order did not require the allegation that the party had been summoned, and the evidence taken in his presence, and upon oath, but the court would intend in favour of the order, that all that had duly happened, whilst it required that all should be expressly averred in a conviction (c); so that the effect of 11 & 12 Vict. c. 43, is to assimilate convictions to orders as they have always been construed.

The following is a sketch of the principal features of the law respecting convictions. The framing them still requires great attention, for they are construed strictly, because the

(a) *Per* Tindal, C. J., *Burgess v. Boetefour and Brown* (1844), 13 L. J. M. C. at p. 126.
(b) *R. v. Lloyd* (1734), 2 Str. 996; Paley on Conv. 7th ed. 171.
(c) Paley on Conv. 7th ed. 171, and cases cited.

jurisdiction exercised is summary (*d*): accordingly no one subject relating to a magistrate's duty requires more care, although defects in form are now, to a certain extent, cured by 11 & 12 Vict. c. 43, and amendable under 12 & 13 Vict. c. 45, s. 7 (*e*).

The authority to convict, being special, and in restraint of the common law, must appear, on the face of the proceedings, to have been strictly pursued according to the letter of the Act by which it was created, so as to show the most material point, viz., that the justice has jurisdiction in the case (*f*); for those who act under a jurisdiction given by Act of parliament, must show that jurisdiction; since in a matter of jurisdiction the court will intend nothing (*g*); but notwithstanding that summary jurisdiction over an offence created by a statute be not conferred by express words upon a justice, it may be implied from the general tenor of the statute; thus, under the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), an offence was created by one section, and by another a penalty was attached to it, and by another an appeal was given to a person aggrieved by the adjudication of justices with regard to any penalty to the quarter sessions; and it was held, that, by implication, a summary jurisdiction was conferred on justices by the several sections read in connection with one another (*h*). It must, also, appear in like manner, that rules similar to those adopted by the common law in judicial proceedings, and founded in natural justice, have been observed; as, for instance, the necessity that the defendant should have notice of the proceedings (*i*); unless the statute (as is the case in some instances) should expressly dispense with the necessity of so stating them. Indeed, it is reasonable that summary convictions should be construed with strictness; because, if regular on the face of them, and unappealed against by the defendant where remedy by appeal is given, they are taken to be true in fact against him, and conclude him from ever bringing an action for malicious prosecution (*k*). "Convictions," said Lord Holt, "ought to be certain, and not taken upon collection" (*l*); for they are in the nature of a verdict and judgment (*m*).

Jurisdiction must appear.

Summary jurisdiction may be conferred by implication.

The rules of natural justice must be observed.

(*d*) *R. v. Green* (1784), Cald. 391, 396, per Ashhurst, J.

(*e*) *Post*, p. 799.

(*f*) Boscawen, 10, cited Paley on Conv. 7th ed. 185.

(*g*) *R. v. Holbeck-in-Leeds* (1742), Burr. S. C. 198; *R. v. Stepney* (1735), *id.* 23; other cases, 1 Burn's J., 30th ed. 1147; *Gossett v. Howard* (1845), 10 Q. B. 411, 452.

(*h*) *Cullen v. Trimble* (1872), L. R. 7 Q. B. 416.

(*i*) *Gill v. Bright* (1871), 41 L. J. M. C. 22; *R. v. Cheshire Lines Committee* (1873), L. R. 8 Q. B. 344.

(*k*) *Mellor v. Badddeley* (1834), 6 C. & P. 374.

(*l*) *R. v. Fuller* (1699), Ld. Raym. 509.

(*m*) *R. v. Harris* (1797), 7 T. R. 238.

An adjudication in a conviction is entire; one part of it cannot be given at one time, and another at a subsequent period (*n*). Nor can it be split; so that if it is not good throughout, it cannot be severed so as to be bad in a material part and good as to the rest, even though the several parts are in their nature distinct (*o*). But it seems that by consent a conviction may be set aside as to a part only (*p*); but an order may be good in part and bad for the residue (*q*).

Commitment
when treated
as a con-
viction.

A warrant of commitment under an Act which treats conviction and commitment as one matter must be construed as a conviction whether it recites a conviction or not (*r*), and comes within 11 & 12 Vict. c. 43. A commitment reciting a conviction, which fails to set forth an offence over which the committing magistrate had jurisdiction, is bad, and the defendant will be discharged on habeas corpus (*s*).

Extent of
11 & 12 Vict.
c. 43.

By 11 & 12 Vict. c. 43, 42 & 43 Vict. c. 49, and 47 & 48 Vict. c. 43, the several statutes and parts of statutes relating to the duties of justices of the peace out of sessions in respect of summary convictions and orders were consolidated, with such additions and alterations as were deemed necessary, and such duties clearly defined, and the provisions of such statutes must always now be borne in mind in dealing with questions arising on convictions and orders, but nothing in 11 & 12 Vict. c. 43 extends (1) to any warrant or order for the removal of poor persons; or (2) with respect to any lunatic; nor [(3) to any information or complaint under any of the revenue statutes relating to the excise, customs, stamps, taxes, or post office, repealed by 42 & 43 Vict. c. 49]; nor (4) to any bastardy orders (except as to this latter to certain exceptions referring to the mode of executing them) (*t*). Proceedings under the Factory Acts were formerly excepted, but the exception was repealed by the Factory and Workshop Act, 1871 (*u*). The first exception, however, does not include an order for the payment of the costs of the maintenance of a pauper for the twenty-one days between the time of the making of an order of removal, and giving notice of chargeability, and the removal where no notice of appeal is given, to which order the Act, therefore, applies (*x*). The third exception does not

An order for
the payment
of costs of
maintenance
of pauper.

(*n*) *R. v. Dimpsey* (1787), 2 T. R. 96, *per cur.*

(*o*) *R. v. Dimpsey*, *sup.*; *R. v. Patchett* (1804), 5 East, 339; *R. v. Catherall* (1730), 2 Stra. 900.

(*p*) *R. v. Hale* (1778), Cowper, 728.

(*q*) *R. v. Robinson* (1851), 17 Q. B. 466; *R. v. Green* (1851), 20 L. J. M. C. 168.

(*r*) *In re Gray* (1844), 14 L. J. M. C. 26; *Lindsay v. Leigh* (1848), 11 Q. B. 455; *Re Geswood* (1853), 23 L. J. M. C. 35; *Bailey's case* (1854), 3 E. & B. 607; *Re Hammond* (1846), 9 Q. B. 92.

(*s*) *R. v. King* (1843), 13 L. J. M. C. 43.

(*t*) 11 & 12 Vict. c. 43, s. 35.

(*u*) 34 & 35 Vict. c. 104, Sched. 2.

(*x*) *Hill v. Thorncroft* (1860), 30 L. J. M. C. 52.

apply where the particular information or complaint proceeds upon a section of a statute not relating to the revenue of excise, &c., although there are other sections in the statute which do so relate. A conviction, therefore, under sect. 8 of 4 & 5 Will. 4, c. 85 (repealed) for signing a false certificate for the purpose of obtaining a licence for the sale of beer, drawn up according to the form provided in the schedule to 11 & 12 Vict. c. 43, was held valid; the word statutes in that exception is to be read enactments (z).

A conviction on a revenue statute relating to a police matter.

The forms to be used (except where any statute creating an offence prescribes a special form) are now governed by the forms in the schedule to the Summary Jurisdiction Rules, 1886.

However, where an Act directs that all convictions shall be made out in the form or to the effect following (giving a particular form), a conviction containing all the substantial parts of the form prescribed will be good, although it be not in the express words thereof, or may contain something more than is directed; but more on this part of the subject hereafter.

The information is the foundation of every proceeding not directed to be merely on the view of the offence by a justice; and should contain four circumstances, correctly stated, viz.,

Of the information.

The day and year when,
The place where,
The name and style of the justice or justices before whom it is exhibited; and lastly,
The charge preferred (a).

It must, however, not now be forgotten that no objection can be taken or allowed to any information, complaint or summons to which the 11 & 12 Vict. c. 43 applies, for any alleged defect therein in substance or in form, or for any variance between such information, complaint or summons, and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint as hereinafter mentioned; but if any such variance shall appear to the justice or justices present and acting at such hearing to be such that the party so summoned and appearing has been thereby deceived or misled, it shall be lawful for such justice or justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day (b). This provision does not extend to the case where the information has been laid, and the party summoned for one offence, and the justices have convicted him of another and different offence, and under a different Act of parliament (c).

Defects in information, or variances between information and evidence.

Variances between the information and the evidence.

(z) *R. v. Bakewell* (1857), 26 L. J. M. C. 150.

(a) Paley on Convictions, 7th ed. 72.

(b) 11 & 12 Vict. c. 43, s. 1.

(c) *Martin v. Pridgeon* (1859), 28 L. J. M. C. 179; *R. v. Brickhall* (1864), 33 L. J. M. C. 156.

Where, on a charge of absenting from service, the contract of service was laid with B. and others, and it appeared at the hearing that the contract was with an incorporated company, consisting of B. and others, this was held to be a variance which was cured by the provisions of sect. 1 (*d*). And further, by 11 & 12 Vict. c. 43, s. 9, in all cases of informations for any offences or acts punishable upon summary conviction any variance between such information, and the evidence adduced in support thereof as to the time at which such offence or act shall be alleged to have been committed, shall not be deemed material if it be proved that such information was, in fact, laid within the time limited by law for laying the same. And in variance between such information and the evidence adduced in support thereof as to parish or township in which the offence shall be alleged to have been committed shall not be deemed material, provided that the offence or act be proved to have been committed within the jurisdiction of the justice or justices by whom such information shall be heard and determined.

Allegation of time when information was exhibited.

If the information appear on the face of the conviction it should contain the day and year when it was taken; if it does not, the conviction itself should show it; as well that it may appear to have been given subsequently to the offence, and before all the other proceedings (*e*), as also that the prosecution may be fixed to be begun within, and not before, the time limited by the statute (*f*); but the statute imposing the limitation of time may do so in such terms as to make the being out of time a matter of defence (*g*). A mistake in the day, if the information was in truth taken in proper time, will not be material, and the fact may be alleged to have happened between such a day and such a day, if the last day is within the proper time (*h*), but any objection on this ground is met, as to cases under 11 & 12 Vict. c. 43, by sect. 1, *ante*, p. 787. Formerly the word month in a statute meant lunar month of twenty-eight days, and twelve months was understood to be forty-eight weeks though "a twelvemonth" was understood to be a calendar year (*i*). But now, and since the Interpretation Act, 1889 (52 & 53 Vict. c. 63), the word month in all Acts means calendar month, unless the contrary intention appears; and in all cases within 11 & 12 Vict. c. 43, where no time is already or shall hereafter be specially limited

Allegations as to time.

Month means calendar month.

(*d*) *Whittle v. Frankland* (1862), 31 L. J. M. C. 81.

(*e*) *R. v. Kent* (1728), Ld. Raym. 1546; Paley, 7th ed. 86. For if the conviction state evidence of witnesses to facts as given on a day subsequent to the information, it will be quashed as being a conviction without an information.

(*f*) *R. v. Fuller* (1699), Ld. Raym. 509; see *id.* 582.

(*g*) *Wray v. Toke* (1848), 17 L. J. M. C. 183.

(*h*) 2 Hawk. c. 25, s. 82; Paley, 7th ed. 192.

(*i*) *Lacon v. Hooper* (1795), 6 T. R. 224.

for making any such complaint, or laying any such information in the Act or Acts of parliament relating to each particular case, such complaint shall be made and such information laid within six calendar months from the time when the matter of such complaint or information respectively arose (*k*). A complaint of the nonpayment of the costs under an order for the costs of the maintenance of a pauper, consequent on the making an order of removal, unappealed against, has been held to be within this section (*l*). Upon a complaint under the Vagrant Act, 5 Geo. 4, c. 83, s. 4, for deserting a wife, whereby she became chargeable to the parish, the time runs from the time of her chargeability, and not from the desertion (*m*).

Limitation of time for laying in-formations.

A complaint under the Metropolitan Building Act, 1855 (*n*), against the owner of a dangerous structure for nonpayment of the expenses incurred by the commissioners in pulling it down in consequence of his default so to do, after demand of the amount and refusal to pay, was held to be within time when made within six months of the demand of the money, though more than six months after the completion of the works (*o*). Proceedings under 38 & 39 Vict. c. 63, s. 20, sub-s. 6, against the original vendor of an article of food or drug for giving a false warranty in writing in respect of it to a purchaser must be commenced within six calendar months from the date of the giving of the false warranty (*p*). The proceedings to be taken by a poor law auditor to recover the amount of a surcharge against overseers under 7 & 8 Vict. c. 101, and 12 & 13 Vict. c. 103, are expressly excluded from the operation of 11 & 12 Vict. c. 43, and nine months are allowed for such proceedings; and it has been held that the 2 & 3 Vict. c. 71, s. 14, giving jurisdiction over such cases within the metropolitan police district to a single magistrate by enacting that all "offences" must be heard and determined within six calendar months, does not apply to reduce the limit of nine months given by the prior Act (*q*).

Matter of complaint, what.

If a statute requires an offence to be prosecuted within a certain time, it is sufficient if the information is laid within that time (*r*).

Limitation of time for making complaint.

An adjudication of justices settling the amount of compensation (under 50*l.*) to be paid by the promoters of an undertaking under the Railways Clauses Act, 1845, and the Lands

(*k*) 11 & 12 Vict. c. 43, s. 11.

(*l*) *Hill v. Thornecroft* (1860), 30 L. J. M. C. 52.

(*m*) *Reaves v. Yates* (1862), 31 L. J. M. C. 241.

(*n*) 18 & 19 Vict. c. 122, s. 73.

(*o*) *Labalmondiere v. Addison* (1858), 28 L. J. M. C. 25.

(*p*) *Whitaker v. Pomfret Brothers*, [1902] 1 K. B. 661.

(*q*) *R. v. Tyrwhitt* (1850), 19 L. J. M. C. 249.

(*r*) *R. v. Barrett* (1710), 1 Salk. 383; see *R. v. Mainwaring* (1858), 27 L. J. M. C. 278.

Clauses Act, sects. 22, 24, 140, in respect of compensation for the injurious affecting of lands, has been held to be an order for the payment of money within 11 & 12 Vict. c. 43, and required to be made within six months after the cause of complaint arose (*s*), but this case has been reflected upon and distinguished from the case of an adjudication to settle the amount of the value of the interest in premises required for the purposes of the undertaking, which the parties were unable to agree upon under the Lands Clauses Act, sects. 22, 24 (*t*).

An application for a distress warrant to enforce local rates under a local Act, is not within the above 11th section (*u*).

An information against a tenant under 2 & 3 Vict. c. 71, s. 38 (The Metropolitan Police Court Act), must be laid within one month after the damage done to the premises (*x*).

It may be taken as a general rule, although there may be special exceptions according to the context and subject-matter of the enactment or contract, that where time is to be counted from an act done, or from a particular day, that day shall be excluded from, and the last day of the time to be computed shall be included in, the time allowed (*y*).

Allegation of
place where
information
was exhibited.

If the information appears in the conviction the place where the information is stated to be given should be stated so as to show that the magistrate was acting at the time within his jurisdiction.

Stating the name of the county by way of venue in the margin of a conviction or information will not be sufficient to show that the justices who made it were acting within the county named when they made it, or that the offence was committed there, but there must be an allegation to that effect in the body of the conviction, either by express words of reference to it or otherwise (*z*).

A court must take notice that a city mentioned in a conviction or order is a county of a city, if it be so; and an order made under an Act giving jurisdiction to justices of a county has been held valid when the justices who made it were justices of a county of a city, but described themselves in it as "in and for the said city" (*a*).

The mention of the county in the margin or venue only shows in what county the conviction was made, and does not

Of the alle-
gation of
venue.

(*s*) *Re Edmundson* (1851), 17 Q. B. 67.

(*t*) *R. v. Hannay* (1874), 44 L. J. M. C. 27.

(*u*) *Sweetman v. Guest* (1868), L. R. 3 Q. B. 262.

(*x*) *Dowell v. Benningfield* (1841), 1 Car. & Mar. 9.

(*y*) *Isaacs v. Royal Insurance Co.* (1870), 39 L. J. Ex. 189, 192, *per Kelly*, C. B.

(*z*) *R. v. Casterton (Inh.)* (1844), 6 Q. B. 507; *R. v. Austin* (1724), 8 Mod. 309; *R. v. Totness* (1849), 11 Q. B. 80; *R. v. St. George, Bloomsbury* (1855), 24 L. J. M. C. 49; *R. v. Newton Ferrers* (1846), 9 Q. B. 32.

(*a*) *R. v. St. Maurice* (1851), 16 Q. B. 908.

supply the want of an allegation of the fact being committed in the county (*b*); nor does the venue in the margin amount even to a statement that the order was made within the place mentioned, for where the name of a borough was inserted in the margin of an order which purported to be made upon a complaint made to A. B. and C. D., "being two of her Majesty's justices of the peace having jurisdiction within and for the said borough," the office and place of act being not otherwise shown on the document, it was held, that there was nothing to show that the order was made within the jurisdiction, and it was therefore held bad (*c*). And the order must allege that they were in the county, &c. referred to in the body of the conviction (*d*); but the venue is so far part of the conviction that it may be incorporated into the body of it by words of reference, as by saying that it was made by "justice of the peace in and for the said county," referring to the venue (*e*).

If a particular locality within a county or diocese, or the distance of one place from another, be an ingredient in the offence charged, it must be defined by express allegation (*f*). Subsequent evidence of matters of fact existing at the hearing cannot supply any defect in the previous charge in the information (*g*); and, as the latter is the foundation on which all the subsequent proceedings must be founded, precision in the description of locality there becomes of primary importance. If the statute, on which the prosecution is founded, be a local one like those for regulating the sale of hay and coals within the bills of mortality, or the Building Act, or that for the improvement of the streets of the metropolis, the place *where* the fact charged was committed is, in importance, at least the second ingredient in describing the alleged offence.

The decisions with reference to the requirements of a conviction on this point will apply to an information not within the 11 & 12 Vict. c. 43, or any similar enactment (*h*).

Upon the information the name and style of the justices, &c. before whom the information was laid must be set forth, in order to show on the face of the proceedings that he has that authority which he claims, viz., not only that he has been appointed for the purpose, but that he has acted within his jurisdiction (*i*); *Ex. gr.* it is not sufficient to style a man

Description
of justices.

(*b*) *R. v. Austin* (1724), 8 Mod. 309.

(*c*) *R. v. Newton Ferrers* (1846), 9 Q. B. 32.

(*d*) *R. v. Totness* (1849), 11 Q. B. 80; *R. v. St. George, Bloomsbury* (1855), 24 L. J. M. C. 49.

(*e*) *R. v. Casterton (Ink.)* (1844), 6 Q. B. 507.

(*f*) *Deybel's case* (1821), 4 B. & Ald. 243; *Brune v. Thompson* (1842), 2 Q. B. 789.

(*g*) But defects and variances are cured by 11 & 12 Vict. c. 43, ss. 1, 9.

(*h*) See *post*, p. 796.

(*i*) *R. v. Johnson* (1719), Stra. 261; *Ex parte Fuller* (1841), 13 L. J.

"justice, &c. *within* the county"; but he must be stated to be such justice, &c. "*in and of* (or *for*) the county" (*k*); but where jurisdiction is given to the justices of a county, and an order is made by justices of a county of a city, which county and city are co-extensive by statute, the order is valid, though the justices describe themselves as justices "*in and for the said city*," for the court will take judicial notice that the city is also a county (*l*). When a statute, moreover, gives cognizance of an offence to the *next* justice, he should be so described, and not merely as a justice, even *in and for* the county: for none but the next accessible justice can have jurisdiction under those words (*m*). But if the Act only mentions "*justices in, or near, the place*" (*n*), or *acting for the division*, it is only directory, so that any justices of the county, or division, &c., it should seem, may act, and no such description need be given in the conviction (*o*). As to disqualification on the ground of interest, see *ante*, p. 42. A person who is a master, father, son or brother of a master in the particular manufacture, trade or business, in or in connexion with which any offence under the Criminal Law Amendment (Violence) Act, 1871 (*p*) is charged to have been committed, is prohibited from acting as a member of a court of summary jurisdiction or appeal for the purposes of that Act (*q*); and as to disqualification in licensing matters, see sect. 60 of the Licensing Act, 1872 (35 & 36 Vict. c. 94).

The charge need not always be reduced to writing (*r*). Some Acts *in totidem verbis* require it; others leave it unnoticed, or only to be collected by inference; but as to informations in general, it would seem to be the general opinion that they need not be in writing (*s*); but with respect to orders within the 11 & 12 Vict. c. 43, it is expressly enacted by sect. 8, that in all cases of complaints upon which a justice or justices of the peace may make an order for the payment of money or otherwise, it shall not be necessary that

M. C. 141. It seems that in all cases, whether judicial or coercive, or ministerial, or even voluntary, as taking recognizances, a justice can only act within the county, &c. in the commission of which he is. Paley on Conv. 7th ed. 19; Dalton, ch. 6, p. 19.

(*k*) *R. v. Dobbyn* (1696), 2 Salk. 474.

(*l*) *R. v. St. Maurice* (1851), 16 Q. B. 908.

(*m*) *Seble, Sanders' case* (1670), 1 Wms. Saund. 263 c.

(*n*) Paley on Conv. 7th ed. 41.

(*o*) *R. v. Price* (1771), Cald. 305. It should, however, be considered how far it is justifiable to drag a defendant, capriciously, and without good cause, before a magistrate living at a great distance, though within the county, when there are others accessible, residing, according to the words of the Act, near.

(*p*) 34 & 35 Vict. c. 32.

(*q*) *Ibid.* s. 5.

(*r*) *Per* Crompton, J., *Turner v. Postmaster-General* (1864), 34 L. J. M. C. 10.

(*s*) *R. v. Shaw* (1865), 34 L. J. M. C. 169.

"Next
justice."

Justices
disqualified.

The informa-
tion or charge
against the
defendant
need not be
in writing.

such complaint shall be in writing, unless it shall be required to be so by some particular Act of parliament upon which such complaint shall be framed.

If the Act requires the complaint to be on oath, it should be stated that the witness was sworn (*t*), and, as it seems also, that he was so sworn before the evidence was given (*u*); but not unless so required by the Act (*x*). Informations or complaints within the 11 & 12 Vict. c. 43, are not required to be upon oath, except where a warrant is to be issued in the first instance, in which case an oath is required (*y*); but where the information is required to be on oath, the omission to take the oath goes to the jurisdiction of subsequent proceedings in a criminal matter, and would be fatal (*z*); but the appearance of the defendant to the summons or warrant granted on such a defective information, and attendance at the hearing without objection, would cure the defect and give validity to the conviction (*a*).

The informer's name should appear in all cases, that the party may know his accuser (*b*). So that if a particular person's dissent is essential to the offence, it must appear that he was the informer, or that the information was laid at his instance (*c*). And if a conviction proceeds upon an enactment framed solely and exclusively for the benefit of a particular body of persons, the information must be laid with the authority of that body (*d*). But a conviction under the Larceny Act for stealing a growing shrub of the value of a shilling, but less than a pound, may be upon the information of any other person besides the party aggrieved, notwithstanding that the justices have power to order the party convicted to pay over to the party aggrieved the value of the article stolen (*e*); and a conviction for trespassing in pursuit of game, against the 30th section of the 1 & 2 Will. 4, c. 32, need not be at the instance only of the owner or occupier of the land, but may at any rate be at the instance of the game-keeper of the lord of the manor, of which the land was held by copy of court roll (*f*). So it is no objection against a com-

Complaints need not be in writing unless specially required.

Oath of informant.

Of the allegation as to the informer.

(*t*) *R. v. Glossop* (1821), 4 B. & A. 616.

(*u*) *R. v. Kiddy* (1824), 4 D. & R. 734.

(*x*) *Basten v. Curew* (1825), 3 B. & C. 649; *R. v. Dove* (1820), 3 B. & A. 596.

(*y*) 11 & 12 Vict. c. 43, s. 10.

(*z*) *Caudle v. Seymour* (1841), 1 Q. B. 889; *R. v. Scotton* (1844), 13 L. J. M. C. 58.

(*a*) *Turner v. The Postmaster-General* (1864), 34 L. J. M. C. 10; *R. v. Berry* (1859), 28 L. J. M. C. 86.

(*b*) *R. v. Smith* (1816), 5 M. & S. 133.

(*c*) *R. v. Daman* (1819), 2 B. & A. 378; per Lord Denman, *Fletcher v. Calthrop* (1845), 6 Q. B. 880.

(*d*) *R. v. Hicks* (1855), 24 L. J. M. C. 94.

(*e*) *Tarry v. Newman* (1846), 15 L. J. M. C. 160.

(*f*) *Morden v. Porter* (1869), 29 L. J. M. C. 213; *Middleton v. Gale* (1838), 8 A. & E. 155.

Who may be
informer.

plaint made by an assistant overseer against a man for deserting his wife and children under the Vagrant Act, 5 Geo. 4, c. 83, that he was not acting under the direction of the board of guardians (*g*). And a common informer might sue for penalties under the Pawnbrokers Act, 39 & 40 Geo. 3, c. 99, ss. 26, 28, 29 (*h*), and may now under the Pawnbrokers Act, 1872 (35 & 36 Vict. c. 93). But if an Act which gives authority to any one to prosecute provides that in case penalties are awarded they shall be paid to certain bodies, it means no more than this, that so long as the informer states that he claims the penalties on behalf of one of the bodies named, any person may lay the information; as where an information was laid under a local Act which incorporated the Towns Police Clauses Act (*i*) for an offence against one of the clauses of the latter Act, by the clerk to paving commissioners acting under the local Act, and by the local Act the justices were to award any penalty recovered under that Act, if not otherwise directed, to be paid to the corporation of the paving commissioners, "according as the proceedings are taken on behalf of either of those bodies," and the clerk had no authority, express or implied, from the commissioners to prefer the particular information in question, it was held that he was a proper person to lay the information, especially as he professed to act under the direction of the statute, to claim the penalties for the bodies entitled to them (*k*).

Every information or complaint within 11 & 12 Vict. c. 43, may be made or laid by the complainant or informant in person or by his counsel or attorney, or other person authorized in that behalf (*l*).

Description of
property in
information.

By 11 & 12 Vict. c. 43, s. 4, provision is made as to the sufficiency of the allegation in an information of the ownership of property in partners, and as to the description of partners, or county works or buildings, or as to the goods of parish officers held for the use of the poor, and of materials and tools provided for repair of highways or turnpike roads, and property of commissioners of sewers.

Names of
defendants.

The names of each and every of the defendants ought also to be correctly inserted, and none of them under any general title or description, as *e.g.* Messrs. H. and company (*m*). But by 11 & 12 Vict. c. 43, s. 4, where it is necessary in an information or complaint, or conviction, or order, to mention any

(*g*) *R. v. Mirchouse* (1863), 32 L. J. M. C. 90.

(*h*) *Caswell v. Morgan* (1859), 28 L. J. M. C. 208.

(*i*) 10 & 11 Vict. c. 89.

(*k*) *Cole v. Coulton* (1860), 29 L. J. M. C. 125.

(*l*) 11 & 12 Vict. c. 43, s. 10.

(*m*) *R. v. Harrison & Co.* (1800), 8 T. R. 508. Exceptions in cases of proceedings under the Turnpike and Highway Acts against drivers misbehaving, are made legal by 3 Geo. 4, c. 126, s. 132.

partners, joint tenants, parceners, or tenants in common, it is sufficient to name one of such persons, and add another or others to make up the description. And such one defendant may be a woman and a *feme covert* (*n*). Description of partners, &c.

As a general rule no one can be made criminally responsible for the acts of third persons, but nevertheless the position of the parties, such as that of master and servant, or principal and agent, or consignor and consignee, may in certain cases raise a presumption in law that the one party knew of the unlawful act of the other, or was ignorant of it, under such circumstances of negligence as to make him responsible for such act (*o*); but proof of want of actual knowledge and of sufficient diligence will, generally speaking, rebut such presumption (*p*). Who to be defendants.

By 11 & 12 Vict. c. 43, s. 5, every person who shall aid, abet, counsel or procure the commission of any offence punishable on summary conviction, may be proceeded against and convicted, either together with the principal offender or before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as the principal offender is by law liable. Aiders and abettors.

A master or keeper of a place of public resort who intends that his servant shall so conduct his house by selling refreshments to, and knowingly suffering prostitutes to assemble as to amount to a misdemeanour if the servant does it, would be guilty as principal, and the servant as aiding and abetting (*q*). So a charter master of a coal mine who was cognizant of the fact of the banksman, who was his servant, breaking a rule of the colliery and did not interfere to prevent it, may be convicted of aiding and abetting the banksman to break the rule (*r*).

Where the act is such that several may join in it, all the offenders may be included in the same information and conviction (*s*).

The essential requisite in charging an offence is, that it contain a direct and positive charge against the defendant, specifying in express terms, and with certainty, every ingredient that is necessary to constitute the crime described by the statute itself; for a statement of facts from which the imputation of an offence is to be inferred or presumed, however plainly, will not suffice, and the like of a statement by way Description of the offence.

(*n*) *R. v. Crofts* (1726), 2 Stra. 1120; see Paley, 7th ed. 80.

(*o*) *Howells v. Wynne* (1863), 32 L. J. M. C. 241; *Michell v. Brown* (1858), 28 L. J. M. C. 53; *Mullins v. Collins* (1874), L. R. 9 Q. B. 292.

(*p*) *Hearne v. Garton* (1859), 28 L. J. M. C. 216; *Dickenson v. Fletcher* (1873), L. R. 9 C. P. 1.

(*q*) *Wilson v. Stewart* (1863), 22 L. J. M. C. 198.

(*r*) *Howells v. Wynne*, *sup.*

(*s*) *R. v. Littlechild* (1871), L. R. 6 Q. B. 293.

No intend-
ment will be
made to
support a
conviction.

of recital or in the disjunctive (*t*). Thus, if knowledge, or consciousness in the offender, be made by statute to constitute a part of the guilt of the transaction, such knowledge or consciousness must be directly averred, and nothing less will serve (*u*). So, if the day or hour at which the act be done, as under some of the game laws, or the place in which it be committed, as in the Acts for the preservation of fish, or the age of any party mentioned in the conviction is made a constituent part of the offence, the same precision in averment is necessary: for no intendment can be admitted in order to assist a description defective in an essential ingredient; but courts and magistrates are bound to take judicial notice of the known divisions of the kingdom, as whether such a place is within or without the bills of mortality, or that a city is a county of a city (*x*), but not of local situations and distances of different places in the counties from each other (*y*).

One convic-
tion for two
offences bad.

To charge two or more offences always invalidated the conviction (*z*); and now, by 11 & 12 Vict. c. 43, s. 10, every complaint within that Act shall be for one matter of complaint only and not for two or more matters of complaint, and every information within that Act shall be for one offence only and not for more offences.

Several rates
may be
charged in
one infor-
mation.

But for the more economical recovery of poor rates, and other local rates and taxes, any number of local rates and taxes, whether of the same or different kinds, due from the same person, should be included in the same information, &c.

Duplicity,
what.

A conviction which charged the keeping open of a licensed beerhouse for the sale of beer, and selling beer, and suffering the same to be drunk and consumed on the premises at an unlawful time, contrary to 11 Geo. 4 & 1 Will. 4, c. 64, s. 14, was held bad as charging more than one offence (*a*). But a conviction under 19 Geo. 2, c. 21, setting out a curse, and stating it to have been "twenty several times repeated," and adjudging 2*l.* for the penalty, was supported as importing only one offence (*b*). And so it is only one offence under 19 Geo. 2, c. 21, that the defendant swore one oath several

(*t*) Paley on Conv. 7th ed. 198; and see Summary Jurisdiction Act, 1879, s. 39 (2), as to formal proof required of complainant.

(*u*) See instances, Paley on Conv. 7th ed. 159. It may be necessary to aver the *mens rea*, though there are no express words of the statute requiring it: *Dickinson v. Fletcher* (1873), L. R. 9 C. P. 1; *Local Board of Abertawe v. Hammett* (1875), L. R. 10 Q. B. 162.

(*x*) *R. v. St. Maurice* (1851), 16 Q. B. 908.

(*y*) *Deybel's case* (1821), 4 B. & A. 243; *R. v. Edwards* (1801), 1 East, 279.

(*z*) *Newman v. Bendyshe* (1839), 10 A. & E. 11; see *Newman v. Earl of Hardwicke* (1838), 8 A. & E. 124.

(*a*) *Newman v. Bendyshe*, *sup.*; see also under the Lottery Act, 22 Geo. 3, c. 47, *R. v. Salomons* (1786), 1 T. R. 249.

(*b*) *R. v. Scott* (1863), 33 L. J. M. C. 15.

times repeated on one and the same occasion(*c*). So the permitting drunkenness and other disorderly conduct, contrary to the tenor of a licence granted for the retailing of beer under 4 & 5 Will. 4, c. 85, is not a double charge, for the charge is one of permission, which may at one and the same time be both of drunkenness and of disorderly conduct(*d*).

Misreciting the purview or enacting part of a statute always vitiates, but a similar error as to the title of it will not(*e*).

The description of the offence must be sufficiently certain. An information charging the defendant with having on the 5th of October last, and on divers other days and times between the said 5th of October and the laying of the information the 16th of November, being the occupier of a house knowingly and wilfully opened, kept and used the same for the purpose of betting, contrary to 16 & 17 Vict. c. 119, was held sufficiently certain to support a conviction for using the house on the 8th of November(*f*).

Description of
the offence.

The description of the offence must be such as to bring it clearly within the words of the Act which declares or punishes it, by containing, in express terms, every ingredient required by the statute. Thus, where justices were empowered by 8 Hen. 6, c. 9, to convict on their own view for unlawful detainer, the omitting to aver or prove an unlawful entry as well as an unlawful expulsion, was held fatal(*g*). It is, in general, sufficient for the convicting justice in his description of the offence to pursue the words of the statute(*h*), or, as Lord Holt continues, "to show such a fact as is within the description of the statute, and to describe it as the statute wills"(*i*); but though it may be sufficient to follow the words of the Act creating the offence as far as the description of it goes, yet it is always necessary to add such facts as show that the party convicted was a party to the offence so described(*k*).

It is also necessary, in some cases, in pursuance of the intent of a statute, to adopt a narrower description than that conveyed in the literal terms of the Act. A well-known

(*c*) *R. v. Scott* (1863), 33 L. J. M. C. 15.

(*d*) *Wray v. Tuke* (1848), 17 L. J. M. C. 183.

(*e*) *Chance v. Adams* (1696), 1 Ld. Raym. 77, relied on *per cur.* in *Nixon v. Nanny*, 1 Q. B. 747.

(*f*) *Onley v. Gee* (1861), 30 L. J. M. C. 222.

(*g*) *R. v. Wilson* (1835), 3 A. & E. 817, where the precedent in *R. v. Elwell* (1727), 2 Ld. Raym. 1514; 3 *id.* 360, is discussed.

(*h*) See *per* Lord Holt, C. J., *R. v. Chandler* (1700), Ld. Raym. 581; and Paley, 7th ed. 192.

(*i*) *R. v. Chandler, sup.*

(*k*) *Chaney v. Payne* (1841), 1 Q. B. 712, 721. Thus, in a conviction under the Pilot Act, 6 Geo. 4, c. 125, for continuing in charge of a ship after a licensed pilot has offered to take charge of her, it must appear on the face of it that defendant knew of the offer: see *R. v. Chaney* (1838), 6 Dowl. P. C. 281.

Description of offence. instance is that of a conviction for "keeping a gun," which alleged the gun as "being an engine to destroy game," within the qualification Act of 5 Anne, c. 14, then in force, and was held bad, because the Act was directed against things which could only be used for destroying game; whereas a gun might be kept without any unlawful design, *e.g.*, to keep pigeons off its owner's grounds (*m*). And as other instances of the rule that the words of an Act are not universally all that must appear on a conviction, where the charge was for fishing in a pond it was held naught for want of negation of the owner's consent (*n*), though the statute does not expressly make that part of the offence.

So, under 9 Geo. 4, c. 69, s. 1, a conviction ought to state that the defendant entered and was in the close for the purpose of taking game there, and it was not sufficient to follow the words of the statute (*o*).

So if the language of a statute creating an offence omits to qualify the Act by the words wilfully or knowingly, yet if the subject-matter necessarily implies that the Act must be committed wilfully or knowingly to make it an offence, a conviction should allege that it was so done (*p*).

Stating the evidence on which the conviction is founded.

Formerly it was the duty of magistrates in all cases, where no concise form is given by statute, to state the whole evidence of the fact on which their judgment proceeds, as nearly as possible in the words used by the witness (*q*). It has, however, been held, that a conviction merely stating the legal effect of his deposition in the words of the statute will be valid in law (*r*); though, in the words of Le Blanc, J., "If a magistrate endeavour to shelter himself from detection, by merely stating the fact of the offence in the terms of the Act as if it were the legal effect of the evidence, when the evidence itself would not warrant the conclusion, he subjects himself to a criminal information" (*s*); and in a similar case, a mandamus

(*m*) *R. v. Gardner* (1724), 1 Burr. 614.

(*n*) *Fletcher v. Calthrop* (1845), 6 Q. B. 880, *per* Lord Denman.

(*o*) *Re Fletcher* (1843), 13 L. J. M. C. 161; *Fletcher v. Calthrop*, *sup.*

(*p*) See *James v. Phelps* (1840), 11 A. & E. 483; *Fletcher v. Calthrop*, *sup.*; *Dickinson v. Fletcher* (1873), L. R. 9 C. P. 1; *Local Board of Aberdare v. Hammett* (1875), L. R. 10 Q. B. 162.

(*q*) *R. v. Lovet* (1797), 7 T. R. 152.

(*r*) *R. v. Pearse* (1808), 9 East, 358. But stating as the offence what is merely the legal result of certain facts not set forth, *e.g.*, the profanely swearing forty oaths, and profanely cursing forty curses, without setting forth what the oaths and curses were, will not suffice: *R. v. Sparling* (1721), Stra. 497. So in proceedings for gaming the game played should be averred: *Colborne v. Stockdale* (1721), *id.* 493.

(*s*) *Ibid.*; see also *R. v. Thompson* (1787), 2 T. R. 18; *R. v. Lovet*, *sup.* In *R. v. Clarke* (1799), 8 T. R. 220, the particular evidence as to the fact of killing the game was set forth (*viz.*, that a witness named swore to having seen defendant use a greyhound to course and kill a hare by that means); and the court recommended it as a precedent to be followed in future.

issued to amend the record of a conviction, by setting out the evidence as nearly as possible in the words used by each witness (*t*).

In convictions, it is sufficient if there were such evidence before the magistrate as in an action would be sufficient to be left to a jury: for if there be evidence before him (*u*) reasonably sufficient to prove the offence, the Court of King's Bench has no authority to examine further, in order to see whether the conclusion drawn by the magistrate be or be not the inevitable (*x*) conclusion from the evidence. Statement of
the evidence.

The extreme inconvenience of the rule requiring the evidence to be stated in the conviction led to the practice of providing forms of conviction in statutes creating new offences, and new forms of conviction to be used under the Summary Jurisdiction Acts, 1848, 1879 and 1884, are provided by the Summary Jurisdiction Rules, 1886.

By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 39, the description of any offence in the words of the Act, or any order, by-law, regulation, or other document creating the offence, or in similar words, shall be sufficient in law. And by the Quarter Sessions or Baines' Act (12 & 13 Vict. c. 45, s. 7), if any objection is made on account of any omission or mistake in the drawing up of an order or judgment by justices, and it is shown to the satisfaction of the court that sufficient grounds were in proof before the justices to have authorized the drawing up thereof free from the said omission or mistake, it may be amended. But sect. 39 of the Summary Jurisdiction Act, 1879, does not do away with the necessity of setting out in a conviction facts which are a necessary ingredient of the particular offence in question (*y*).

When anything turns on particular sums or quantities they must be specified, particularly where the magistrate is called on to compensate the injury, or assess a penalty by way of damages (*z*).

It was formerly held that all circumstances of exemption or modification, whether applying to the offence or the person, that are originally contained in the enacting clause, or incorporated by reference with it, must be distinctly enumerated and negated in the information, and this ruling was the cause of many appeals. But now, by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 39, sub-s. 2, any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany in the same section the description of the offence in the Act, order, by-law, regulation, or

(*t*) *R. v. Warnford* (1825), 5 D. & R. 489. This case, perhaps, occasioned the general form in 1 & 2 Will. 4, c. 32, s. 39 (Game Act).

(*u*) *R. v. Smith* (1800), 8 T. R. 588; *R. v. Reason* (1795), 6 T. R. 375.

(*w*) *R. v. Davis* (1795), 6 T. R. 177.

(*y*) *Smith v. Moody*, [1903] 1 K. B. 56.

(*z*) Paley, 7th ed. 225, collects the cases.

other document creating the offence, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the informant or complainant.

Necessity for
a summons.

It is against natural justice to convict a man without summoning him (*a*); accordingly, in all cases, except those few in which particular Acts have given justices jurisdiction to convict offenders on view of the offence (which, however, when exercised, must be stated accordingly on the face of the conviction), a summons of the defendant is a necessary step in the proceedings, that he may have time to prepare himself for defence; and unless oath be made of the personal service of the summons, the justices cannot proceed in his absence (*b*); thus an order made by justices for the payment, by the persons having the control of the funds of a railway company, of special constables appointed upon the expectation of a tumult, occasioned by the behaviour of persons employed on railway works, was quashed, because no summons had issued or notice given to the defendants of the application for the order, the statute enabling the justices to make the order, upon being satisfied by the oath of three witnesses that the appointment of the constables was occasioned by the behaviour of the railway men (*c*). The service of such summons should be stated in the conviction. If the conviction or order be not within 11 & 12 Vict. c. 43, or there is no concise form of conviction given by the statute under which the conviction takes place, it is sufficient to state that the party was "duly summoned," without further particularizing the circumstances; for the court above will always suppose a magistrate has executed his authority regularly, where nothing to the contrary appears (*d*). If, however, it be thought necessary to set out the summons, it must, on the face of it, be in all respects regular, or the conviction will be quashed (*e*); the days of making the complaint, and of issuing the summons to appear at a certain time and place (*f*), and the authority to summon must appear to have been correctly stated, as well as the proof of personal service of the summons on the defendant, and also that sufficient time was allowed for defence (*g*); but now, since 11 & 12 Vict. c. 43, it is not necessary to allege the service of the summons.

(*a*) *R. v. Cotton* (1732), 1 Sess. Ca. 219; *R. v. Cleg* (1721), Stra. 475; *R. v. Stafford* (1835), 5 N. & M. 94.

(*b*) *R. v. Allington* (1725), Stra. 678; *R. v. Venables* (1724), *id.* 630; 11 & 12 Vict. c. 43, s. 13.

(*c*) *R. v. Cheshire Lines Committee* (1873), L. R. 8 Q. B. 344.

(*d*) *R. v. Stone* (1801), 1 East, 639.

(*e*) *R. v. Venables* (1724), 2 Ld. Raym. 1405.

(*f*) If place is not mentioned, it will be intended to be that where the information was laid: *R. v. Swallow* (1799), 8 T. R. 284.

(*g*) *R. v. Mallinson* (1758), 2 Burr. 679.

It is necessary to state before whom the defendant appeared in consequence of the summons, so as to show the authority to convict; and it was formerly considered doubtful whether the hearing of the defence and the adjudication must not be by the same justice who received the information; but now, by 11 & 12 Vict. c. 43, s. 29, in all cases of summary proceedings before a justice or justices of the peace out of sessions upon any information or complaint as aforesaid, it shall be lawful for one justice to receive such information or complaint, and to grant a summons or warrant thereon, and to issue his summons or warrant to compel the attendance of any witnesses, and to do all other necessary acts and matters preliminary to the hearing, even in cases where by the statute in that behalf such information or complaint must be heard and determined by two or more justices; and after the case shall have been so heard and determined, one justice may issue all warrants of distress or commitment thereon, and it shall not be necessary that the justice who so acts before or after such hearing shall be the justice or one of the justices by whom the said case shall be heard and determined; provided always, that in all cases where by statute it is or shall be required that any such information or complaint shall be heard and determined by two or more justices, or that a conviction or order shall be made by two or more justices, such justices must be present and acting together during the whole of the hearing and determination of the case. This section does, however, seem to apply to cases where by former statutes a specified number of justices or other persons were required to receive the information or complaint (*h*).

Information received by one justice, adjudication by another.

If the party do not appear, the justice or justices, after proof of summons duly served, may proceed to judgment in his absence (*i*); but it is not generally necessary (unless such necessity be expressed in, or logically to be inferred from, the words of the statute on which the conviction is founded) that the defendant should appear in person; for he may appear by his attorney or counsel (*k*); and, if he does so, it must be so stated in the conviction, for otherwise the record would not be a true representation of the facts as they actually occurred.

Absence of defendant.

A confession supplies the want of evidence, and cures any objection to the manner of taking such evidence; as, that it was not taken in defendant's presence, or that it was improperly admitted (*l*). But it will not extend or help out the description of the offence as laid in the conviction (*m*); or avail, if the fact confessed be penal only under certain cir-

(*h*) See *R. v. Griffin* (1846), 9 Q. B. 155.

(*i*) 11 & 12 Vict. c. 43, s. 13.

(*k*) *Ibid.* ss. 12, 13.

(*l*) *R. v. Hall* (1786), 1 T. R. 320; Paley on Conv. 7th ed. 117.

(*m*) *R. v. Clarke* (1774), Cowp. 35.

Of the evidence on the hearing.

cumstances, *e.g.*, want of consent of owner of fishery, which are omitted in the charge (*n*).

If the defendant appears, but denies the charge (or, as has been before observed, neglects to appear), the next step is to substantiate the information by testimony, as provided by 11 & 12 Vict. c. 43, s. 14.

By 11 & 12 Vict. c. 43, s. 15, every prosecutor of any information within that Act, not having any pecuniary interest in the result of the same, and every complainant in any such complaint as aforesaid, whatever his interest may be in the result of the same, shall be a competent witness to support such information or complaint respectively; and every witness at any such hearing as aforesaid shall be examined upon oath or affirmation, and the justice or justices before whom such witness shall appear, for the purpose of being so examined, shall have full power and authority to administer to every such witness the usual oath or affirmation.

And see as to the competency of witnesses, *ante*, p. 300.

By the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), the prisoner can now give evidence in all criminal trials on his own behalf: see *ante*, p. 325.

In these summary convictions, the opinion of the justice being substituted for that of a jury, according to the common law process, the weight of the evidence on either side, if there be any essential difference, must be determined by the justice; therefore, if the evidence on the part of the prosecution sufficiently applies to the facts alleged, and constitutes the offence charged, whatever be the evidence brought to rebut it by the defendant, everything respecting the credit to be given to the one or the other, which would be fit to be left to a jury, must in like manner be considered as left to the opinion of the justice; and his conclusion, fairly drawn from it, cannot be disturbed, except on appeal (*o*).

Ouster of jurisdiction by a claim of right.

There is a general rule of law implied in the construction of all statutes (*p*), that if the act complained of be done under a *bonâ fide* claim of right, the jurisdiction of justices is ousted (*q*); and upon the claim of right appearing on the evidence, as it must necessarily do, though the magistrate must, of necessity, determine for the time whether the claim is *bonâ fide*, because on that question depends whether he hears

(*n*) *R. v. Corden* (1769), 4 Burr. 2279; see *R. v. Daman* (1819), 2 B. & Ald. 378.

(*o*) *R. v. Davis* (1795), 6 T. R. 177; *R. v. Smith* (1800), 8 T. R. 588; Paley, 5th ed. 126. Upon an information for an assault upon a woman, when the woman swore the assault amounted to a rape, her credibility is for the justices, who may, on her evidence, convict of the assault only: *Wilkinson v. Dutton* (1863), 32 L. J. M. C. 152; but see *Re Thompson* (1860), 30 L. J. M. C. 19.

(*p*) See Paley on Conv. 7th ed. 145.

(*q*) *R. v. Burnaby* (1703), 1 Salk. 181.

the case on the merits, his determination is not conclusive (*r*); but the above rule does not apply where it is of the essence of the jurisdiction of the justices to ascertain the status of the property. It then becomes part of the inquiry which is committed to their cognizance, and which they are bound and compellable to enter upon. Thus, upon a complaint by parish officers under 59 Geo. 3, c. 12, s. 24, for the purpose of obtaining possession of a parish house, the justices must inquire whether the house in question be a parish house, and they must decide that question, though the evidence adduced before them raised the question whether the house was the property of the person informed against, or of his ancestor (*s*). So, on a complaint made against a person for his share of the cost of paving a street, it was held, that the justice was to determine whether the place in question was a street or not, upon evidence which raised the question whether there had been a dedication of the road to the public (*t*). And upon an application by a landlord under 1 & 2 Vict. c. 74, to justices to recover possession of premises held over by his tenant after the expiration of the term, the tenancy having been proved, and its legal determination, and the tenant's refusal to quit, it was held, that the justices had jurisdiction to give the landlord possession, and it was not ousted by the tenant's setting up the title of a third person (*u*).

The *bonâ fide* claim of right, however, must be a reasonable and possible one in law, and if it be not so the justices are right in disregarding it (*x*); but if it is not obscure or impossible in law the justices are estopped from inquiring into the merits of the claim (*y*); but it may not be conclusive evidence of want of *bonâ fides* that the party had had a verdict found against him on the same title (*z*). The distinction between a claim possible in law and one deemed not possible may be illustrated by a case where, in answer to an information for fishing in a private fishery, the *locus in quo* being a non-navigable river, the defendant set up a right as one of the public, which the justices were held right in disregarding, though the defendant set up his claim in the *bonâ fide* belief that he had such right (*a*). And in a case where, upon a

(*r*) *Thompson v. Ingham* (1850), 19 L. J. Q. B. 189; *Barber v. Nottingham and Grantham Rail. Co.* (1864), 33 L. J. C. P. 193.

(*s*) *Ex parte Vaughan* (1866), L. R. 2 Q. B. 114; *R. v. Allen* (1866), 7 B. & S. 902.

(*t*) *R. v. Dayman* (1857), 7 E. & B. 672.

(*u*) *Rees v. Davies* (1858), 4 C. B. (N. S.) 56.

(*x*) *Hudson v. M' Rae* (1863), 33 L. J. M. C. 65; *Leatt v. Vine* (1861), 30 L. J. M. C. 207.

(*y*) *Scott v. Baring* (1895), 18 C. C. C. 128.

(*z*) *Kimmsley v. Orpe* (1780), Dougl. 517; see *Hart v. Andrews* (1820), 3 B. & A. 341; *R. v. Justices of Hampshire* (1834), 3 Dowl. 477.

(*a*) *Hudson v. M' Rae*, *sup.*

similar information, the *locus in quo* was a navigable river, the justices were held wrong in proceeding after a *bonâ fide* claim of right as one of the public had been set up by the defendant, because in a navigable river, according to *Carter v. Murcott* (*b*), the public, *primâ facie*, have a right of fishing (*c*).

Claim of right
on hearing.

In some cases the statute expressly empowers a magistrate to decide on a claim of right, as in 11 Geo. 2, c. 19, s. 4, upon which statute the justices have jurisdiction to convict a party of fraudulently removing his goods to avoid a distress, though it appeared that the title to the premises was disputed, and that the tenant had actually paid his rent to one of the claimants (*d*).

The justice cannot by deciding a fact a particular way give himself jurisdiction in a case where he otherwise would not have it. The law on this subject was much discussed in *R. v. Bolton* (*e*), and the effect of that case was stated in *Thompson v. Ingham* (*f*) to be, that where the charge is such as, if true, is within the magistrate's jurisdiction, the finding of the facts afterwards by the magistrate is conclusive: but where the charge is not such as, if true, would be within the magistrate's jurisdiction, no finding of facts can alter it; and it was further held in that case, that where the judge has *primâ facie* jurisdiction to try a question, as, for instance, a county court judge a plaint for use and occupation, and on the evidence the question of title arises, the jurisdiction ceases, though the judge must, of necessity, determine the question for the time, because on it depends whether he hears it on the merits, but then his determination is not to be conclusive (*g*).

Adjourn-
ments.

Adjournments, if granted by the justices, should be stated to show that they were not made to a time beyond that limited by the Act for the conviction to take place in (*h*).

Thus, if a statute requires that a conviction may be made within three months after the offence was committed, the adjudication must take place within that time, and the laying the information is not sufficient (*i*); or that penalties should be recovered within a similar time the judgment must be given within that time (*k*).

Adjudication

Every conviction must contain an adjudication of the defen-

(*b*) 4 Burr. 2163.

(*c*) *R. v. Stimpson* (1863), 32 L. J. M. C. 208.

(*d*) *Coster v. Wilson* (1838), 3 M. & W. 411.

(*e*) (1841), 1 Q. B. 66.

(*f*) (1850), 19 L. J. Q. B. 189.

(*g*) *Thompson v. Ingham* is approved of in *Barber v. Nottingham and Grantham Rail. Co.* (1864), 33 L. J. C. P. 193.

(*h*) *R. v. Tolley* (1803), 3 East, 467; *R. v. Bellamy* (1823), 1 B. & C. 500.

(*i*) Paley on Conv. 7th ed. 113.

(*k*) *R. v. Mainwaring* (1858), 27 L. J. M. C. 278; but the court were divided in opinion on this point.

dant's having been convicted, whether the punishment be or be not fixed by the statute (*l*). There must also be a judgment of forfeiture (*m*); for it is said, where there is an appeal, "it is not from the judgment of the justice as to the fact, but because he has ordered a penalty to be paid, or has committed the defendant, who wants to stay execution, or be released from prison" (*n*).

Magistrates should be careful, lest in awarding punishment, whether corporeal or pecuniary, they step beyond their powers, or an action of trespass will lie against them (*o*) after the conviction has been quashed on appeal or upon application to the King's Bench, but see the Justices' Protection Act, 1848 (*p*).

The adjudication on every point to which it refers must be precise and exact; for a judgment for too little is as bad as a judgment for too much; and this is so, whether it respect the fine, the costs, or any other portion of the penalty which has been attached to the commission of the offence (*q*). In a case where the commitment was, that "the defendants should lie in prison till they pay their fine;" no precise fine being mentioned, the court quashed the conviction (*r*). Where a statute enacted that on nonpayment of the penalty and costs, the offender shall be committed for a time certain, or until the penalty and charges shall be paid (as was the case under 6 Geo. 1, c. 16 (*s*), for cutting down timber trees), a conviction which adjudged him to be imprisoned a certain time, or until the forfeiture, together with the charges previous to, and attending the said conviction, be paid, but did not ascertain what the charges were, was held bad (*t*). So, where 7 Geo. 2, c. 11 (local), gave power to a magistrate for a borough, on a summary conviction there against that Act, to levy the penalties by distress, together with the reasonable charges of taking and keeping such distress; a conviction returned upon *certiorari*, which did not adjudge what the defendant was to pay for those charges, was admitted to be bad, and quashed (*u*).

Conviction must be certain and precise.

Magistrates having power to award damages "not exceeding"

(*l*) *R. v. Harris* (1797), 7 T. R. 238; relied on *per cur. Day v. King* (1836), 5 A. & E. at p. 365.

(*m*) Paley, 7th ed. 201; and see forms in Summary Jurisdiction Rules.

(*n*) But where a statutory form is followed, it may not be necessary to go on to order the payment of the penalty: *Barnes v. White* (1845), 14 L. J. M. C. 65.

(*o*) *Groome v. Forrester* (1816), 5 M. & S. 314; *Newman v. Earl of Hardwicke* (1838), 8 A. & E. 124.

(*p*) 11 & 12 Vict. c. 44, s. 2.

(*q*) *R. v. Salomons* (1786), 1 T. R. 249.

(*r*) *R. v. Elwell* (1727), Ld. Raym. 1514, cited *R. v. Wilson* (1835), 3 A. & E. 817; see also *Morgan v. Brown* (1836), 4 A. & E. 515.

(*s*) Repealed 7 & 8 Geo. 4, c. 27.

(*t*) *R. v. Hall* (1774), Cowp. 60.

(*u*) *R. v. Symonds* (1800), 1 East, 189.

a certain sum stated, have not power to award that sum at all events, but are to ascertain the amount of damage in each case, and award reasonable compensation according to the amount of injury proved. They cannot go beyond the extreme sum, but are not to award that sum unless damage is proved to a like amount (*v*).

Where a statute gives summary proceedings for various offences specified in several sections, a conviction is bad which leaves it uncertain under which section it took place (*w*). As where the consequences of a conviction are made by different sections to differ in reference to the amount of damage done by the offender, it must be shown on the conviction what the amount of damage done was, to show within which section the offence came (*w*). And where a statute is repealed by implication, and in the repealing statute an offence under the former statute is re-enacted, but with a different form of procedure, and a different punishment, a conviction professing to be obtained under the former statute cannot be supported under the later one (*x*).

In affixing the punishment of an offence which may be proceeded against on one or other of two different statutes, care must be taken not to blend the penalties under both (*y*). If distinct offences are charged in the information, judgment that the defendant is convicted of the said offence will be bad, for uncertainty to which offence the single penalty inflicted was referable (*z*).

The conviction and the charge must correspond.

The conviction must be in respect of the identical charge laid, as where the charge has been made *secundum allegata et probata*, and parties have professed to proceed under one statute, as for drunkenness, and riotous behaviour under 10 & 11 Vict. c. 89, s. 29, a conviction of drunkenness alone under 21 Jac. 1, c. 7, was not supported (*a*).

As to awarding corporeal punishment.

Where magistrates are invested with discretion as to awarding corporeal punishment, their judgment must be stated on the conviction with equal certainty as if it was for paying a penalty (*b*). Where no discretion is given to magistrates, it

(*v*) *R. v. Harpur* (1822), 1 D. & R. 222, *per* Best, J. The conviction was set aside for not showing an offence within the Act.

(*w*) *Charter v. Græme* (1849), 13 Q. B. 216.

(*x*) *Michell v. Brown* (1858), 28 L. J. M. C. 53.

(*y*) *R. v. Clarke* (1774), Cowp. 35; *R. v. Hoseason* (1811), 14 East, 605; Paley, 7th ed. 218.

(*z*) *R. v. Salomons* (1786), 1 T. R. 251. Held otherwise where the particular offence for which the penalty was inflicted was stated: *R. v. Chandler* (1811), 14 East, 267, 4th objection.

(*a*) *Martin v. Pridgeon* (1859), 28 L. J. M. C. 179; see also *R. v. Brickhall* (1864), 63 L. J. M. C. 156.

(*b*) Thus at the time when magistrates might order incorrigible rogues to serve his majesty either by sea or land, a conviction ordering one to be employed in "his majesty's service," without adding whether by sea or land, was held bad: *R. v. Patehett* (1804), 5 East, 341.

was at one time obligatory to inflict the whole punishment provided by law (*c*), but now by 42 & 43 Vict. c. 49, s. 4, a court of summary jurisdiction may, in the case of imprisonment, impose the same without hard labour, and reduce the prescribed period, and in the case of a fine, if imposed in respect of a first offence, may reduce the prescribed amount thereof.

Where a person is convicted before justices of having committed several offences punishable summarily by imprisonment for not exceeding three calendar months, they may adjudge the imprisonment for the full term for each offence under the provisions of 11 & 12 Vict. c. 43, s. 25, and make each term commence at the expiration of the prior imprisonment (*d*).

A defendant might formerly be convicted of several offences of the same kind, and of several penalties in one conviction; but now every complaint must be for one matter of complaint only, and every information for one offence only (11 & 12 Vict. c. 43, s. 10). Several offences must not be included in one conviction.

But whenever several acts are charged to have been committed, it must depend on the words of the statute inflicting the penalties, whether they are distinctly incurred for distinct offences, or whether the several acts done form only one aggregate offence requiring but one penalty (*e*). A conviction for having on the 5th October last, and on divers other days and times between the said 5th October and the laying of the information, which was on the 16th of November, opened, kept, and used a house for the purpose of betting with persons resorting thereto, was held good as charging a single offence (*f*). The same question often arises in regard to the acts of joint offenders, when it depends upon the wording of the particular statutes in each case whether they are liable to a collective penalty or each to a separate penalty (*g*).

Under the Public Health Act, 1848 (*h*), three persons were convicted separately of exposing for sale a piece of meat unfit for human food, and it was held rightly so (*i*). Acts done on

(*c*) *R. v. Hoseason* (1811), 14 East, 606, on 20 Geo. 2, c. 19, inflicting, on conviction by a magistrate, the punishment of commitment to the house of correction, there to remain and be corrected, and held to hard labour. Correction, *i. e.*, whipping, was held a necessary part of the judgment. See *R. v. Salomons* (1786), 1 T. R. 249.

(*d*) *R. v. Cutbush* (1867), L. R. 2 Q. B. 379.

(*e*) Paley, 7th ed. 208; *R. v. Matthews* (1711), 10 Mod. 27; *R. v. Scott* (1863), 33 L. J. M. C. 15; see also *Collins v. Hopwood* (1846), 16 L. J. Ex. 124; *Att.-Gen. v. McLean* (1863), 32 L. J. Ex. 101.

(*f*) *Onley v. Gee* (1861), 30 L. J. M. C. 222.

(*g*) See p. 808; and Paley, 7th ed. 212; *R. v. Littlechild* (1871), L. R. 6 Q. B. 293.

(*h*) 11 & 12 Vict. c. 63.

(*i*) *Re Hartley* (1862), 31 L. J. M. C. 232; see *R. v. Criddle* (1857), 27 L. J. M. C. 28; *Mayhew v. Wardley* (1863), 14 C. B. N. S. 550.

different days must always be treated as distinct offences (*j*); but different acts done on one day are liable to the distinction just taken (*k*), and each particular case must be decided by the wording of the statute on which the conviction is founded, assisted and fortified by the analogy of similar cases (*l*).

Joint offences.

It is to be observed, that where a statute imposes a penalty on any person or persons who shall do an act prohibited, there, if two persons do such act together, and are jointly convicted, it is deemed but one offence, and the magistrate can only inflict one penalty. Thus, where two defendants were convicted in *5l.* each, under 5 Anne, c. 14, s. 4, for using a greyhound to destroy game without being qualified, the court at once quashed the conviction; for it was only one offence, so that the magistrate should only have convicted them in one penalty (*m*); and under 29 Car. 2, c. 7, selling rolls at different times on a Sunday composed only one act of exercising the offender's ordinary calling [see the Act], and was also held to be only one offence (*n*). But if either the penalty imposed by the statute be upon each person convicted, or if the offence be several in its nature, so that the guilt of each of the parties is essentially distinct from that of the others, the parties ought to be convicted in several and distinct penalties (*o*). Though the information be joint the conviction may be several. See as to not making several liable on joint conviction for the costs of each other, *R. v. Cridland* (*p*). Where two were jointly convicted of an assault, under 9 Geo. 4, c. 31, s. 27, which was then an offence several in its nature, and a joint fine was imposed, it was held illegal, and the conviction bad in substance, so as to make the committing justices liable in trespass (*q*). If the penalty is ascertained by the conviction when returned to the sessions, the court above will not inquire when it was so fixed (*r*).

A conviction must be good in all its parts, and differs from an order in not being divisible (*s*). The judgment in particular being an entire act, cannot be severed, so that if bad

(*j*) *R. v. Matthews* (1711), 10 Mod. 27.

(*k*) *Brooks v. Milliken* (1789), 3 T. R. 509. Two sales of books on one day, contrary to a statute, were held to subject defendant to two penalties, the acts of sale being distinct: Paley, 7th ed. 211.

(*l*) *R. v. Clarke* (1777), Cowp. 610; see cases collected, Paley, 7th ed. 208 *et seq.*

(*m*) *R. v. Bleasdale* (1792), 4 T. R. 809; *R. v. Swallow* (1799), 8 T. R. 286; *Marriot v. Shaw* (1717), Comyn's Rep. 274.

(*n*) *Crepps v. Durden* (1777), Cowp. 640.

(*o*) *R. v. Drake* (1686), 2 Show. 489, a deer-stealing case; *R. v. Hube* (1794), 5 T. R. 542, joint disturbance of tolerated congregation; *Crepps v. Durden*, *sup.*; *R. v. Elwell* (1727), Ld. Raym. 1514; see *Re Hartley* (1862), 31 L. J. M. C. 232, *ante*, p. 807.

(*p*) *R. v. Cridland* (1857), 27 L. J. M. C. 28.

(*q*) *Morgan v. Brown* (1836), 4 A. & E. 515.

(*r*) *R. v. Elwell*, *sup.*; Paley, 7th ed. 219.

(*s*) *R. v. Salomons* (1786), 1 T. R. 249; Paley, 7th ed. 219.

as to part, the whole is thereby vacated, though the parts may be in their nature distinct (*t*).

The distribution of the penalty does not generally form a necessary part of the judgment, and no provision is made in the form under the Summary Jurisdiction Rules, 1886. Where the statute itself points out the proportions to be distributed, it is clear that no distribution need (prior to the issue of the Summary Jurisdiction Rules, 1886) have been made (*u*), because nothing is left uncertain or discretionary. Distribution of the penalty.

But where justices are required by a penal statute to distribute the penalty on conviction, amongst certain persons, "according to their discretion," or in any other indeterminate proportions, an adjudication that the forfeiture be disposed of as the law directs is bad, for in such case the justices should adjudge what the several proportions shall be (*x*). Again, where the Act fixes the amount, but leaves the magistrate to select the description of objects to receive its distribution, or where the amount and description of objects are both fixed, but the individuals answering that description are uncertain, the magistrate must, at the time of the adjudication, exercise his discretion in selecting, by name, a party to receive the amount. The application and distribution of the penalty to such party should afterwards be distinctly stated on the face of the conviction (*y*).

By the 32nd section of 11 & 12 Vict. c. 43, it was enacted, "that the several forms in the schedule to this Act contained, or forms to the like effect, shall be deemed good, valid and sufficient in law." A conviction, therefore, which follows the form given by the statute, requiring the penalty to be paid and applied according to law, and applicable to the case, is valid (*z*); and, therefore, where such a form was followed in a conviction under the Game Acts (*a*), which requires the justice to exercise a discretion as to the person who was to receive the penalty, it was held that though the words of the form used might not have been sufficient under the Game Acts, yet it was quite sufficient under the 11 & 12 Vict. c. 43, though it does not name the person to whom the penalty is to be paid, for that may be done by word of mouth (*b*). The distinction between cases where a discretion has to be exercised, and those where the statute fixed the mode of distri-

(*t*) *R. v. Catherall* (1730), Stra. 900; Paley on Conv. 7th ed. 221.

(*u*) *R. v. Barrett* (1710), 1 Salk. 383.

(*x*) *R. v. Dimpsey* (1787), 2 T. R. 96; see *R. v. Symonds* (1800), 1 East, 189.

(*y*) See *R. v. Smith* (1816), 5 M. & S. 133.

(*z*) *R. v. Hyde* (1852), 21 L. J. M. C. 94; *Re Allison* (1854), 10 Exch. 561. But see *R. v. Johnson* (1845), 8 Q. B. 102, as to the distinction between a part of a form relating to a description of the offence and that relating to the adjudication of the penalty.

(*a*) 1 & 2 Will. 4, c. 32; and 5 & 6 Will. 4, c. 20, s. 21.

(*b*) *R. v. Hyde*, *sup.*

Distribution of the penalty. bution, was there taken, as it had been in the cases of *Re Boothroyd*(c), and *Chaddock v. Wilbraham*(d), before 11 & 12 Vict. c. 43.

Where the distribution directed by the statute was part to the party aggrieved, and the remainder to "the overseers of the poor of the parish," a distribution to "the poor of the township" was held bad, because there may be many townships in the same parish, and it was not stated which, or that it maintained its own poor; so that there was uncertainty(e). And an adjudication of a penalty to be paid to a wrong person is invalid as being a clear excess of jurisdiction, as, for instance, where the statute requires a moiety to be paid to the overseers of the parish and a moiety to the informer, the conviction is bad if it order the whole to be paid to the overseers(f); or where a moiety is required by the statute to be paid to the overseers to be applied to the county rate, and the conviction order it to be paid to the treasurer of the county(g).

Costs. Costs also form a constituent part of the adjudication, every part of which must be precise and exact. Where a statute did not mention costs, the convicting magistrate had no power of awarding them till 18 Geo. 3, c. 19. This Act is repealed, and 11 & 12 Vict. c. 43, s. 18, enacts that, in all cases of summary convictions or orders within 11 & 12 Vict. c. 43, the justice or justices making the same in his or their discretion are to be at liberty, in and by such conviction or order, to order the defendant to pay to the prosecutor or complainant such costs as shall seem just and reasonable to him or them, or in cases of dismissal of the complaint, the prosecutor or complainant to pay costs, and the sums so allowed for costs shall be specified in such conviction or order, or order of dismissal.

The power to enforce payment of such costs is provided by the same section, subject to the provisions of the Summary Jurisdiction Act, 1879, by sect. 6 of which (*inter alia*) it is provided, that sums payable under an order shall be deemed to be civil debts.

Independently of that statute, a conviction of four persons for a joint offence, adjudicating each to pay a certain fine, or a certain sum for costs, and until payment of such several

(c) (1846), 15 M. & W. 1.

(d) (1848), 5 C. B. 645.

(e) *R. v. Priest* (1796), 6 T. R. 538. "Vill" is presumed to be co-extensive with "parish": see *R. v. Wyatt* (1727), 2 Ld. Raym. 1478. "Lambeth" in evidence in conviction; "St. Mary, Lambeth," in adjudication of penalty in conviction; held no variance, it not appearing that these were two distinct parishes: *R. v. Glossop* (1821), 4 B. & A. 616.

(f) *Griffiths v. Harries* (1837), 2 M. & W. 335.

(g) *Chaddock v. Wilbraham*, *sup.*

sums each was to be imprisoned, was held bad, as it made each liable for the other (*h*). And again, a conviction under 29 Car. 2, c. 7, for selling fruit on the Lord's day, which adjudged the defendant to pay five shillings and eleven shillings costs, and if the several sums should not be paid forthwith, to be levied by distress, and in default of sufficient distress adjudged the defendant to be set publicly in the stocks for the space of two hours, unless the said several sums, and all costs and charges of the distress shall be sooner paid, was quashed on the ground that the putting the defendant in the stocks was clearly unauthorized as respects the costs; for by 29 Car. 2, c. 7, the punishment of the stocks was intended to be in the place of a penalty, and not as a mode of recovery of it: and by 11 & 12 Vict. c. 43, the costs are to be recoverable in the same manner as the penalty was recoverable, and that it would be in this case by distress (*i*).

It follows, therefore, that where any particular Act directs costs to be paid, with their distribution, and the mode of compelling payment of them, as well as of the fine, it must be precisely complied with in the adjudicatory portion of the conviction: but where the Act inflicting a penalty on the offence is silent as to costs, then, if awarded at all, the sum, &c. is to be adjudicated with similar precision, according to the Act just set forth. The adjudication must fix the precise sum of the fine to be paid, and the costs, as well as the duration of any alternative discretionary imprisonment for nonpayment of fine, or costs, or both (*k*); nor can the justice delegate the duty of ascertaining any one of these matters, for an award "of such costs as to certain other persons (named) shall seem reasonable" vitiates the conviction (*l*); but where a conviction was drawn up and signed by the justices with a blank space left for the amount of costs, which was inserted by the magistrate's clerk at a subsequent time, this was held to be a mere irregularity, but not an excess of jurisdiction (*m*).

The costs of the appeal against a conviction are noticed *post*, p. 820.

The adjudication is perfected by the convicting justice or justices (as the statute by which it is authorized may require) subscribing and sealing it. By this Act it becomes a record, and without it it cannot be produced before any court for any ulterior purpose, as for appeal, &c. (*n*). An order is suffi-

Conclusion
of adjudica-
tion.

(*h*) *R. v. Cridland* (1857), 27 L. J. M. C. 28.

(*i*) *R. v. Barton* (1849), 18 L. J. M. C. 56.

(*k*) *R. v. Symonds* (1800), 1 East, 189; *R. v. Payne* (1824), 4 D. & R. 72.

(*l*) *R. v. St. Mary, Nottingham* (1810), 13 East, 57, n.; *Selwood v. Mount* (1841), 1 Q. B. 726; *R. v. Clark* (1844), 5 Q. B. 887.

(*m*) *Bott v. Ackroyd* (1859), 28 L. J. M. C. 207.

(*n*) *R. v. Elwell* (1727), Ld. Raym. 1514.

ciently sealed if an impression is made on it with ink by means of a stamp (*o*). An ordinary signature by justices will suffice (*p*). It is usual to add the date of the adjudication, taking care to bring it within the time limited by statute for the conviction to be made in (*q*).

If a charge falls short of the necessary legal description of the offence, the omission is not cured by any allegations of its being done unlawfully or fraudulently, or the like, or by stating it was against the form of the statute, for the last allegation is no more than a legal inference which must be supported by the premises (*r*). The word "duly," to fill up the description of the offence itself, is not sufficient, where an Act requires certain specific Acts to be done (*s*).

General form
of conviction.

By 11 & 12 Vict. c. 43, s. 17, in all cases of conviction where no particular form of such conviction is or shall be given by the statute creating the offence, or regulating the prosecution for the same, and in all cases of convictions upon statutes hitherto passed, whether any particular form of conviction have been therein given or not, it shall be lawful for the justices or justice who shall so convict, to draw up his or their conviction on parchment, or on paper, in such one of the forms of conviction in the schedule to this Act contained, as shall be applicable to such case, or to the like effect. And validity was given to these forms by the 32nd section of the same Act.

This schedule was repealed by the Summary Jurisdiction Act, 1884, so far as applied to any forms of conviction for which another form was provided by the rules under that Act and the Act of 1879. Such forms are contained in the "forms to the Summary Jurisdiction Rules, 1886."

Forms of
conviction.

As to superfluous matter, commonly denominated surplusage, if a statute direct the conviction of any offence under it to be drawn up according to an annexed form, or to the effect thereof, and the convicting justice insert other particulars besides all the requisites indicated by the statute itself, they do not invalidate the instrument or its effect (*t*). Therefore, if unnecessary particulars be inserted, and are incorrect as to fact, the incorrect item in that surplusage cannot vitiate that

(*o*) *R. v. St. Paul's, Covent Garden* (1845), 14 L. J. M. C. 109.

(*p*) *R. v. Worthenbury* (1845), 14 L. J. M. C. 144.

(*q*) See *R. v. Peckham* (1697), Comberb. 439; *R. v. Bellamy* (1823), 1 B. & C. 500; Paley, 7th ed. 230. Month in an Act of Parliament now means calendar month: 13 & 14 Vict. c. 21, s. 4.

(*r*) *Anon.* (1578), Dy. 363; *Colborne v. Stockdale* (1721), 1 Stra. 493; and see *Re Geswood* (1853), 23 L. J. M. C. 35; *Fletcher v. Calthrop* (1845), 6 Q. B. 880; *Re Fletcher* (1843), 13 L. J. M. C. 16; *R. v. Martin* (1838), 8 A. & E. 481; *R. v. Seward* (1834), 1 *id.* 706; *R. v. Rowlands* (1851), 21 L. J. M. C. 81.

(*s*) *R. v. Bidwell* (1847), 1 Den. C. C. 222; *R. v. Keighley* (1846), 15 L. J. M. C. 102.

(*t*) *R. v. Jefferies* (1792), 4 T. R. 768; *Massey v. Johnson* (1809), 12 East, 67; and see cases cited, Paley on Conv. 7th ed. 176.

part of the conviction which is correct and good (*u*): thus, an impossible or incongruous date, if not material, may be rejected as surplusage (*x*).

The difficulty of fixing absolutely any definite criterion for determining what are words of surplusage is not to be entirely removed, because every case must stand on its own peculiar circumstances, but may be assisted by analogy to the law of indictments (*y*).

In convictions directed by statutes, wherein summary forms are given (omitting the information, summons and evidence), the material part begins at the word "convicted." It is equally necessary in these, as it is in common law convictions, that certain essential ingredients should appear on the face of the instruments, viz., the jurisdiction of the convicting magistrate, the time, the place and the charge, in such terms as to bring the whole within the description given of the offence in the Act; also, that the defendant had not any such defence as his then observing these particulars might have afforded him; for, without these being evident upon the inspection of the record, the court cannot say that he has incurred the penalty, or subjected himself to the forfeiture annexed. Thus, under the old bread Acts, if the offence was laid where an assize had been set, it was necessary to set forth what the assize was in that place, in order to show what was the deficiency of weight; to state the time of purchasing and of weighing, in order to show that the article was found deficient within the then limited terms for trial, and the species of bread, to show that the object of the complaint did not fall within the exception (*z*).

It is very common in the summary forms inserted in statutes to find the words "*(here state the offence)*." When they occur, they are to be explained by the foregoing rule of construction, *i.e.*, the offence must be described as fully as is there insisted on; *ex. gr.*, the statute against combinations and among journeymen manufacturers (*a*) gave a summary form, in which, by way of a parenthesis, these words were inserted. On them it was decided, that agreements among these workmen for certain specified purposes being the offence to be punished, it was necessary that the agreement itself should be set out in the conviction, in order to show, on the face of it, that it was an agreement for the special purposes denounced by the statute in the very terms used therein; so that it might appear that the magistrate had authority to convict, and that

Forms of
conviction.

(*u*) *R. v. Hall* (1786), 1 T. R. 320; and see *R. v. Huntley* (1860), 29 L. J. M. C. 70.

(*x*) *R. v. Picton* (1802), 2 East, 195; and see 12 & 13 Vict. c. 45, s. 10.

(*y*) See *ante*, p. 176.

(*z*) 55 Geo. 3, c. 99, &c.; but see and consider the effect of sect. 39 (2) of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49).

(*a*) 39 & 40 Geo. 3, c. 106.

the defendants had incurred the penalty (*b*); but a variation from the precise words of the statute is not fatal if the words used are such as to bring the case within the plain meaning of the Act of Parliament (*c*), but if not, then the variation is fatal (*d*).

In some of these statutable forms, titles of Acts are ordered to be set forth thus “(*here set forth the title of the Act*).” Wherever these directions occur, they should be strictly complied with; but any insignificant variation will not be fatal if the title is stated with sufficient clearness and accuracy as to leave no reasonable doubt as to the statute intended (*e*).

Evidence of
summary
conviction.

The duty of returning a conviction under hand and seal of the convicting justice to the next quarter sessions is clear. It may be returned to the sessions on paper or parchment; if to the King's Bench on a *certiorari*, on parchment only.

11 & 12 Vict. c. 43, s. 14, enacts that if the justice or justices convict or make an order against the defendant, “a minute or memorandum thereof shall be made for which no fee shall be paid, and the conviction or order shall be afterwards drawn up by the said justice or justices in proper form under his or their hand and seal or hands and seals, and he or they shall cause the same to be lodged with the clerk of the peace, to be by him filed among the records of the general quarter sessions of the peace; or if the said justice or justices shall dismiss such information or complaint, it shall be lawful for such justice or justices, if he or they shall think fit, being required so to do, to make an order of dismissal of the same, and shall give the defendant in that behalf a certificate thereof, which said certificate afterwards, upon being produced without further proof, shall be a bar to any subsequent information or complaint for the same matters respectively against the same party.

And although a mandamus will not be granted against a magistrate's clerk to return a conviction (as he is a mere servant), yet the justices are liable to have a rule granted against them (*f*).

In all cases where a conviction is necessary, if the convicting justice, after receiving due notice of appeal, neglects to return the conviction to the sessions, whereby the party is prevented from prosecuting his appeal, independently of any other punishment for such misbehaviour in his office, he is liable to an action on the case for special damages (*g*). Subject to the

(*b*) *R. v. Nield* (1805), 6 East, 417.

(*c*) *R. v. Ridgway* (1822), 5 B. & A. 527.

(*d*) *R. v. Hazell* (1810), 13 East, 139.

(*e*) *R. v. Westley* (1859), 29 L. J. M. C. 35; see *Nixon v. Nanney* (1841), 1 Q. B. 747; *Chance v. Adams* (1696), 1 Ld. Raym. 77; *Re Boothroyd* (1846), 15 M. & W. 1.

(*f*) *Ex parte Hayward* (1863), 32 L. J. M. C. 89.

(*g*) *Proser v. Hyde* (1786), 1 T. R. 414.

above duty, and to that of certifying to the clerk of the peace any fine which may be imposed (*h*), magistrates are not bound by the conviction, as first drawn up, whether it is merely a note of the conviction, or drawn up in a formal manner as the conviction itself; and when they return the conviction to the quarter sessions (*i*), or are called on by *certiorari* to do so into the King's Bench (*k*), they are at liberty to draw up and return a more formal conviction correcting any errors which may have existed in that first drawn up, provided the latter conviction accords with the truth, and with the facts of the case as proved before them (*l*). This course may be taken though the conviction has been acted on, and execution actually executed by commitment of the defendant or levy of the penalty (*n*). It is immaterial for this purpose that the party has been induced to appeal by having received a copy of a bad conviction from the clerk to the convicting magistrates (*o*). And further, now upon the trial of an appeal, or upon a return to a writ of *certiorari*, objections to orders for omissions and mistakes may be rectified under 12 & 13 Vict. c. 45, s. 7 (*p*). But after a conviction has been quashed on appeal or *certiorari* for defects on the face of it, it is not competent for the convicting justice to protect himself from an action by drawing up another more formal one for the same offence: nor can he do so after the defendant who was taken under a warrant founded on and reciting a defective conviction has been discharged by *habeas corpus*, though the conviction itself has not been removed or quashed (*q*).

Return of
amended
conviction.

A defendant ought, on application, to receive a copy of his conviction from the convicting justice; for it is a record, and he is entitled to any advantage that may arise from it (*r*), and see 11 & 12 Vict. c. 43, ss. 14 and 17. But if, without fraud or intention to mislead, a copy be given to the party demanding it, which is not correct, and a correct one be returned to the quarter sessions, the copy so returned is the only proper record of which that court can take cognizance (*s*). It being argued that the defendant was taken by surprise at the sessions, by the production of a conviction returned there different from that of which he had received a copy, and

Defendant
has a right to
a copy of his
conviction.

(*h*) See *ante*, p. 67.

(*i*) *E. g.*, on appeal against it, *post*, p. 816.

(*k*) It is sufficient answer to a *certiorari* that the justice has returned the conviction to the quarter sessions: *R. v. Eaton* (1787), 2 T. R. 285.

(*l*) *Per cur.* in *Chaney v. Payne* (1841), 1 Q. B. at p. 722.

(*n*) *Massey v. Johnson* (1809), 12 East, 67; *Gray v. Cookson* (1812), 16 East, 13; *Bott v. Aekroyd* (1859), 28 L. J. M. C. 207; see *per* Lord Kenyon in *R. v. Barker* (1800), 1 East, 186.

(*o*) *R. v. Allen* (1812), 15 East, 333.

(*p*) See *post*, p. 821.

(*q*) *Chaney v. Payne*, *sup.*

(*r*) *R. v. Midlam* (1765), 3 Burr. 1720.

(*s*) *R. v. Allen*, *sup.*

against which he had given notice of appeal, Bayley, J., answered, that if that was the case, he should have then applied to the sessions for further time, viz., to grant an adjournment, so that he might be prepared to answer the conviction as it then stood (*t*).

SECTION 2.

APPEALS AGAINST SUMMARY CONVICTIONS AND ORDERS.

As to appeals
against
convictions.

An appeal from a conviction of justices out of sessions to the justices in quarter sessions is not a matter of common right, but must be conferred by express enactment (*u*), which cannot be extended by equitable construction to cases not distinctly enumerated, even where former Acts gave an appeal, and “all the powers, matters and things contained” in them are extended to the subsequent Act on which the conviction takes place (*x*). So that the express exclusion of an appeal contained in some Acts is quite needless.

However, a general power of appeal given by statute cannot be excluded by mere inference (*y*) without positive enactment in the particular instance (*z*); and where a statute gave a right of appeal against a conviction but excluded an appeal in the case of a commitment for the same offence, and the conviction and commitment were contained in the same document, the court held the commitment to be one and the same thing with the conviction for the purpose of the appeal (*a*). Under the Highway Act (*b*), when any highway board consider any highway unnecessary for public use, they may direct the district surveyor to apply to two justices to view the same, and thereupon “the like proceedings shall be had” as where application is made under the Highway Act, 1835, to procure the stopping-up of a highway, and this was held to give an appeal against the certificate or order of the justices declaring

(*t*) *R. v. Allen* (1812), 15 East, 333.

(*u*) For, *per* Lord Ellenborough, in *R. v. Skone* (1805), 6 East, 514, “if there be no words which bear reference to any appeal, the court cannot supply the want of them”; and see *R. v. Justices of Oxford* (1813), 1 M. & S. 448; *R. v. Skone*, *sup.*; *R. v. Justices of Surrey* (1788), 2 T. R. 504; *R. v. Justices of Cashibury* (1823), 3 D. & R. 35; *R. v. Hanson* (1821), 4 B. & A. 519.

(*x*) *R. v. Justices of Surrey*, *sup.*; *R. v. Skone*, *sup.*

(*y*) *R. v. Justices of Cumberland* (1822), 1 B. & C. 64.

(*z*) *R. v. Bedwell* (1854), 24 L. J. M. C. 17.

(*a*) *R. v. Justices of Staffordshire* (1810), 12 East, 572.

(*b*) 27 & 28 Vict. c. 101, s. 21.

it to be unnecessary (*e*). Some statutes confer the appeal with reference to the amount of penalty imposed by the conviction; see as to this, *post*, p. 824.

Unless the statute giving the appeal makes the appeal operate to stay execution pending the appeal, it has not that effect, for the appeal is like a writ of error which, at common law, is no *supersedeas* of execution in criminal cases (*d*).

Section 27 of 11 & 12 Vict. c. 43, applies only to cases where execution has not been issued before the appeal, but does not authorise that execution be suspended pending the appeal (*e*); but in appeals under the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 110), the person appealing shall be liberated on entering into the recognizance required by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 31, sub-s. 3).

Appeal is no stay of execution.

Justices before whom an information on a penal statute is laid are in the situation of jurymen, so that if a defendant be acquitted by them, the Court of King's Bench cannot reverse the judgment; and that is so, even though the justices state, in return to a *certiorari*, evidence which *prima facie* is sufficient to convict; for the evidence given is entirely and exclusively for the consideration of the justices below, who are placed in the situation of a jury; and if they acquit a defendant, the court cannot substitute themselves in the place of the justices, acting as jurymen, and convict him; for they cannot judge of the credit due to the witnesses, whom they did not hear examined; all that they can do is, to look to the form of the conviction, and see that the party, if convicted, has been convicted by legal evidence (*f*). If any question of law arising on the evidence is intended to be submitted to the court, a case must be stated by the justices, under the 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, s. 33.

No appeal from an acquittal of a defendant.

The justices' judgment is conclusive as to the credibility of the evidence.

The sessions to which the appeal is to lie is now fixed by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49). By sect. 31, the appeal shall be made to the next practicable court of general or quarter sessions having jurisdiction in the county, borough, or place for which the court of summary jurisdiction acted whose decision is to be appealed against, and holden not less than fifteen days after the day on which the decision was given upon which the conviction or order was founded. And by sect. 32, where by any Act passed before the Summary Jurisdiction Act, 1879, an appeal lies to the next court of general or quarter sessions, the provisions of sect. 31, as given above, shall apply. And now by 47 & 48 Vict. c. 43, s. 6, where any person is authorised by any Act

To what sessions.

(*e*) *R. v. Justices of Surrey* (1869), L. R. 5 Q. B. 87.

(*d*) *Kendall v. Wilkinson* (1855), 24 L. J. M. C. 89; *R. v. Brook* (1788), 2 T. R. 190.

(*e*) *Ex parte Willmott* (1861), 30 L. J. M. C. 151.

(*f*) *R. v. Reason* (1795), 6 T. R. 375.

passed before the Summary Jurisdiction Act, 1879, to appeal from the conviction or order of a court of summary jurisdiction made in pursuance of the Summary Jurisdiction Acts to a court of general or quarter sessions, he shall, after the passing of this Act, appeal to such court subject to the conditions and regulations contained in the Summary Jurisdiction Act of 1879, with respect to an appeal to general or quarter sessions.

The appellant. The appellant must be the person authorised to appeal by the particular statute from which the right to appeal is derived. The right to appeal is not lost by the fact that the appellant, when charged before the justices, admitted an act of assault, but asked for the charge to be heard on the ground of mitigating circumstances (*g*). But where, under sect. 12 of the Summary Jurisdiction Act, 1879, an adult consents to be dealt with summarily by a court of summary jurisdiction, and is convicted and adjudged to be imprisoned without the option of a fine, there is no appeal under sect. 19 of the Act to quarter sessions against such conviction (*h*). And where there is a right of appeal to quarter sessions from a conviction, this right is not excluded by the fact that the conviction has been made pursuant to a direction of the High Court on a case stated. The order of the High Court directing the justices to convict is final and conclusive within the meaning of sect. 14 of the Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43), but the conviction itself is a different thing from the order to convict, and is not final and conclusive (*i*). An appeal may be brought to quarter sessions on the sole ground that the sentence was excessive, and the conviction may be quashed on that ground. Where the respondent does not appear before the quarter sessions, the court is justified in quashing the conviction, inasmuch as, by the procedure on such appeals, the respondent has to begin and prove the matters complained of (*k*).

Notice. By sect. 31, sub-sect. (2), of the Summary Jurisdiction Act, 1879, the appellant shall, within the prescribed time, or, if no time is prescribed, within seven days after the day on which the decision of the Court was given, give notice of appeal by serving on the other party and on the clerk of the said court of summary jurisdiction notice in writing of his intention to appeal, and of the general grounds of such appeal.

If persons are jointly aggrieved, they may give a joint notice of appeal, although the convictions were separate, and six separate convictions were returned to the sessions (*l*). By

(*g*) *R. v. Justices of Essex, Ex parte Stark*, [1892] 1 Q. B. 490.

(*h*) *R. v. Justices of London, Ex parte Lambert*, [1892] 1 Q. B. 664.

(*i*) *R. v. Justices of Waterford*, [1900] 2 Ir. 307.

(*k*) *R. v. Justices of Surrey and Bell*, [1892] 2 Q. B. 719.

(*l*) *R. v. Justices of Oxfordshire* (1842), 12 L. J. M. C. 40.

sub-sect. 7 of sect. 31, such notice shall be in writing signed by the appellant, or his agent in his behalf, and may be transmitted as a registered letter by the post in the ordinary way, and shall be deemed to have been served at the time when it would be delivered in the ordinary course of post. Notice sent by post, but returned through the dead letter office, is not a good notice (*m*). Where notice is not sent by post, but is served on the other party, it has been held that personal service is not required; and where the information was laid in the name of one superintendent of police, but at the hearing another superintendent appeared and conducted the case by the authority and as representative of the informing superintendent, it was held that personal service on the latter was not required, but that service of notice of appeal on the superintendent who conducted the case was sufficient (*n*); but service upon the solicitor who appeared for the respondent at petty sessions is bad, as it was held he had ceased to be respondent's solicitor when the proceedings at petty sessions determined (*o*).

Where two notices have been given, and the appellant has elected to proceed upon the second, which was found to be bad for want of the prescribed recognizance, it was held that the first notice remained good, and that the appellant was entitled to proceed upon it after failing upon the second (*p*).

The notice to be served on the clerk of the court of summary jurisdiction need not be addressed to the justices from whose decision the appeal is brought (*q*).

The notice need not be in any special form, so long as the intention of the party appealing is clearly set forth, and full particulars given of the name of the appellant, the conviction appealed from, the sessions at which the conviction took place, the names of the convicting justices, the sessions to which appeal is to be made, and the grounds on which the appeal is made. If any other provisions are contained in the statute under which the appeal lies, those requirements must be satisfied. The test, however, of a notice is whether the inclusion of particulars which prove to be false, or the exclusion of particulars which might be material, is of such a character as to mislead the respondents; if not misleading, the notice is good.*

By sub-sect. 3 of sect. 31, the appellant shall, within the prescribed time, or, if no time is prescribed, within three days after the day on which he gave notice of appeal, enter into a recognizance before a court of summary jurisdiction, and the

(*m*) *R. v. Justices of Essex* (1895), 43 W. R. 378.

(*n*) *R. v. Justices of Somersetshire, Ex parte Talbot* (1900), 69 L. J. Q. B. 311.

(*o*) *R. v. Justices of Oxfordshire*, [1893] 2 Q. B. 149.

(*p*) *R. v. Recorder of Wolverhampton* (1887), 35 W. R. 650.

(*q*) *R. v. Justices of Essex, Ex parte Stark*, [1892] 1 Q. B. 490.

section provides for sureties and the conditions of the recognizances, and also provides that the court before whom the appellant appears to enter into a recognizance may permit the appellant, if it thinks expedient, instead of entering into a recognizance, to give such other security by way of deposit, of money or otherwise, as the court thinks sufficient.

It has been held that the intention of this section was that the court allowing a deposit should have the notice of appeal before them, and an allowance made before notice of appeal had been given is invalid, and a court of quarter sessions was right in refusing to hear an appeal made under such circumstances (*r*).

The recognizance required by this section need not be entered into before the justices from whose decision the appeal is being taken; it can be entered into before any court of summary jurisdiction which has before it the notice of appeal in the case (*s*).

But though, by reason of a recognizance having been entered into by the appellant after the expiration of three days, the court of quarter sessions has no jurisdiction to hear the appeal, yet the recognizance is not void, and the court has power to estreat the recognizance for non-payment of such costs as may have been awarded upon the dismissal of the appeal (*t*).

Where a court of quarter sessions allows an appeal against a joint conviction against several defendants, the conviction as against all of them must fall, even though one of such appellants has not validly entered into the necessary recognizances to prosecute the appeal (*u*).

Where a recognizance is entered into in due time, but is defective in other respects, the court has power to permit a new recognizance to be substituted therefor under 12 & 13 Vict. c. 45, s. 8.

The court has power, under sub-sect. 5 of sect. 31, to adjourn the hearing of the appeal, and, by the same section, to make such order as to costs to be paid by either party as the court may think just. An order under this section must, however, direct that the costs be paid to the clerk of the peace, to be handed over by him to the other party (*x*). Such costs are recoverable in manner provided by 11 & 12 Vict. c. 43, s. 27, and upon production to a magistrate of a certificate that costs have not been paid, a warrant of distress may issue, and, in default of distress, the debtor may be committed for a period not exceeding three calendar months.

(*r*) *R. v. Justices of Anglesey*, [1892] 2 Q. B. 29; *R. v. Justices of Cheshire* (1896), 60 J. P. 585.

(*s*) *R. v. Justices of Durham, Ex parte Newton*, [1895] 1 Q. B. 801.

(*t*) *R. v. Justices of Glamorganshire* (1890), 24 Q. B. D. 675.

(*u*) *R. v. Justices of Waterford*, [1901] 2 Ir. R. 548.

(*x*) *Gay v. Matthews* (1862), 33 L. J. M. C. 14.

The court of quarter sessions must tax the costs during the sitting (*y*), or at an adjournment of the same sittings (*z*); but where no consent has been given to a taxation out of sessions, a subsequent court of quarter sessions has no jurisdiction to make an order on the clerk of the peace to tax the costs (*a*); but, per Lord Herschell, the practice to tax out of sessions has become so common that the slightest evidence of consent will suffice (*b*).

Upon an appeal against a conviction under the Vagrant Act, 1824, the court of quarter sessions are empowered to make an order for payment of the prosecutor's costs. In the case of an appeal from justices of a county borough having a separate commission of the peace, but not a separate court of quarter sessions, it was held that the order for costs must be made upon the treasurer of the county, and not upon the borough treasurer (*c*).

If justices refuse to hear an appeal on a preliminary objection, which the court can see to be a matter of law and not of fact, as on the ground of a misdescription of the conviction appealed against, they will be compelled by mandamus to hear, if there has been no variance, or, at all events, one which could not be a material one or calculated to mislead (*d*).

Refusal of sessions to hear appeal.

Defects in form on grounds of appeal shall not be allowed, and no objection to the reception of evidence offered in support of any ground of appeal shall prevail, unless the court shall be of opinion that such ground of appeal is so imperfectly or incorrectly set forth as to be insufficient to enable the party receiving the same to inquire into the subject of such statement, and prepare for trial, and power is given to the court, if it thinks the objection should prevail, to amend the grounds upon terms (*e*). In case of frivolous grounds of appeal, a power over the costs is given by 12 & 13 Vict. c. 45, s. 4.

Defects in grounds of appeal.

On the appeal being called on, the conviction returned to the sessions is produced by the clerk of the peace, and the counsel for the appellant may then object, if he can, to any technical errors in it, *e.g.*, to any of the irregularities already adverted to.

Proceedings at the hearing.

"If upon the trial of any appeal to any court of general or quarter sessions of the peace against any order or judgment

Defects in form.

(*y*) *Freeman v. Read* (1860), 30 L. J. M. C. 125; *R. v. Justices of Hants* (1862), 33 L. J. M. C. 104.

(*z*) *R. v. Justices of Hants, sup.*; *Rawnsley v. Hutchinson* (1871), L. R. 6 Q. B. 305.

(*a*) *Midland Rail. Co. v. Edmonton Union*, [1895] A. C. 485.

(*b*) *Ibid.*

(*c*) *R. v. Justices of Yorkshire (West Riding)*, [1900] 1 Q. B. 291.

(*d*) *R. v. Justices of Oxfordshire* (1842), 12 L. J. M. C. 40; see also *R. v. Recorder of Liverpool* (1850), 20 L. J. M. C. 35; *R. v. Justices of Bucks* (1854), 24 L. J. M. C. 15.

(*e*) 12 & 13 Vict. c. 45, s. 3, *ante*.

made or given by any justice or justices of the peace, or if upon the return to any writ of certiorari any objection shall be made on account of any omission or mistake in the drawing up of such order or judgment, and it shall be shown to the satisfaction of the court that sufficient grounds were in proof before the justice or justices making such order or giving such judgment to have authorized the drawing up thereof free from the said omission or mistake, it shall be lawful for the court, upon such terms as to the payment of costs as it shall think fit, to amend such order or judgment and to adjudicate thereupon, as if no such omission or mistake had existed: provided always, that no objection on account of any omission or mistake in any such order or judgment brought up upon a return to a writ of certiorari shall be allowed, unless such omission or mistake shall have been specified in the rule for issuing such certiorari" (*f*). Under the Larceny Act, 1861 (*g*), no conviction or adjudication made on appeal therefrom under that Act shall be quashed for want of form, or be removed by certiorari. A similar enactment is contained in the Malicious Injuries to Property Act (*h*), and the Offences Against the Person Act (*i*).

Clerical
errors.

Where a clerical error is manifest on the face of the document, it will be read as it ought to have stood (*k*).

Evidence on
the hearing
of an appeal.

If no such objections be taken to the conviction itself, the case is opened for the respondent, and supported by the witnesses. Where a statute does not provide to the contrary, as the statutes relating to inland revenue do, it is competent for the parties on appeal to adduce all the additional witnesses they desire without regard to whether they have been called or examined on the hearing before the justices below, for the appeal is in this respect like a new trial (*l*). If the party convicted does not appear according to his recognizance and notice of appeal, the court cannot enter and hear it at the instance of respondent, but it may give costs under 12 & 13 Vict. c. 45, s. 6 (*m*). If the parties appear, after the evidence in support of the conviction is gone through, the appellant enters upon his case, and shows, if he can, the insufficiency of the evidence to bring him within the description or penalties of the statute. The course of proceeding in appeals has been already considered, and all the usual rules apply to appeals against convictions (*n*).

(*f*) 12 & 13 Vict. c. 45, s. 7.

(*g*) 24 & 25 Vict. c. 96, s. 111.

(*h*) 24 & 25 Vict. c. 97, s. 69.

(*i*) 24 & 25 Vict. c. 100, s. 72.

(*k*) *R. v. Williams* (1852), 21 L. J. M. C. 150.

(*l*) *R. v. Hall* (1866), L. R. 1 Q. B. 632; *R. v. Pilgrim* (1870), L. R. 6 Q. B. 89.

(*m*) See *ante*, p. 477.

(*n*) *Ante*, p. 463.

Whatever judgment the justices give must be the act of the court itself, and not by any delegation of its authority (*o*). Even the few instances which may be produced as exceptions to this rule will, on examination, be found not to operate as such, but in effect to confirm it. Thus, where the justices in session appointed a committee from their own body to institute an inquiry, and make an examination, relative to the propriety of repairing or rebuilding a bridge which had become a nuisance, the Court of King's Bench were of opinion that they were right in so doing, in order to receive their report and information relative to facts; for, after all, the judgment was the judgment of the session, although such session might adopt the opinion of the individual justices who had made their report (*p*).

Judgments on appeals against convictions, and awarding costs.

Enough has been said respecting an appeal proceeding on the merits, in the regular course, to judgment. But an appeal may also be dismissed for informality, *e.g.*, for not giving the notice or entering into the recognizance which are made the conditions of the appeal by the Act which gives it; and as such dismissal is conclusive, the conviction will be confirmed, and no second appeal can be lodged against it, though brought within the time fixed for appealing by the statute which gives the appeal (*q*).

Second appeal after first dismissed for informality.

In the case of appeals limited to the next session, if the appellant rely on an objection of form, and, independent of the merits, procures the conviction to be quashed on that ground, he cannot (even though the court above shall have set aside the order of session, and set up the conviction again) go to the sessions again, and have the question heard there upon the merits (*r*).

But an appeal may be adjourned by the court for future hearing, by adjourning the sessions to a day not later than that on which the next quarter sessions, original or adjourned (*s*), is held. This power of adjournment, being incident to the court for attaining the ends of justice, is not superseded by words in a statute, giving an appeal to the sessions within four months after the cause of complaint shall arise, and directing that "the justices of the said session shall determine the matter" (*t*). Unavoidable surprise of any kind upon the party as to part of the subject appealed against, the absence of witnesses, necessity for inquiry suggested either by the counsel for the parties, or for the information of the court, may all be sufficient reasons for adjournment; and it is to be

Power of adjourning appeals regularly entered.

(*o*) *Ante*, p. 465.

(*p*) *R. v. Justices of Glamorganshire* (1793), 5 T. R. 279; *R. v. Justices of Westmoreland* (1868), L. R. 3 Q. B. 457; see *ante*, p. 466.

(*q*) *R. v. Justices of Yorkshire (West Riding)* (1790), 3 T. R. 776.

(*r*) *R. v. Allen* (1812), 15 East, 346.

(*s*) See *ante*, p. 466.

(*t*) *R. v. Justices of Wiltshire* (1811), 13 East, 352.

understood that an adjournment *ex vi termini* implies that everything during the time of such adjournment remains *in statu quo*; viz., that no advantage or disadvantage to the parties, as to notices or other matters generally affected by efflux of time, is worked by such postponement of hearing. But as, where the sessions is adjourned, the style of it must not run "at such session held by adjournment," the original meeting of the session ought to be set forth, and that it was "continued by them from thence to such further time by adjournment;" and that it was then holden accordingly by such adjournment (*u*). The record of proceedings had at it must follow the same course.

But the power of adjournment can only be exercised on appeals brought regularly before them, by every previous condition having been complied with. Thus, if for want of any notice, or other preliminary step, made a condition by the statute, the appeal could not be entered, the court cannot by adjourning acquire a jurisdiction to try it at a future time; for the right of appeal is gone for ever (*x*).

Appeals in
particular
cases—appeal
against
summary
convictions
under Larceny
Act.

A special right of appeal is given by 24 & 25 Vict. c. 96, s. 110, in all cases where the sum adjudged to be paid on any summary conviction shall exceed 5*l.*, or the imprisonment adjudged shall exceed one month, or the conviction shall take place before one justice only.

By sect. 111, no conviction (such as mentioned in sect. 110) or adjudication made on appeal therefrom shall be quashed for want of form, or be removed by certiorari into any of his Majesty's superior courts of record.

An appeal clause in language similar to sect. 110 of the Larceny Act, 1861, is given in 24 & 25 Vict. c. 97, s. 68.

With reference to the amount of the judgment giving the appeal, it has been decided on 12 & 13 Vict. c. 92, that the sum adjudged to be paid means the penalty only, irrespective of the amount of costs also imposed (*y*).

And where imprisonment is ordered only in default of payment of the penalty, that does not give an appeal if the sum adjudged by way of penalty is under the requisite amount (*z*).

(*u*) See the cases cited *ante*, p. 31; also *R. v. Harrowby* (1737), Burr. S. C. 102.

(*x*) *R. v. Justices of Oxfordshire* (1813), 1 M. & S. 448; see *R. v. Justices of Lincolnshire* (1824), 3 B. & C. 548.

(*y*) *R. v. Justices of Warwickshire* (1856), 25 L. J. M. C. 119.

(*z*) *Ibid.*

CHAPTER XI.

OF FORFEITED RECOGNIZANCES AND ESTREATS.

RECOGNIZANCES are only the means pointed out by the law to secure the performance of certain conditions imposed by it (*a*), and their estreat is the consequence of the failure of those conditions. A breach, therefore, of them, while the court continues sitting, can only be considered, as it were, incipient; to be completed and confirmed by a continuance of default, or to be superseded and avoided by compliance before the expiration of the session (*b*). So that, though the moment a recognizance is taken it becomes a record, yet it had always been the practice, that upon the party bound by recognizance appearing in court, or doing any other act imposed by the conditions, exhibiting a satisfactory affidavit of any sufficient reason for his non-compliance with the terms, for the court, on motion being made for that purpose, to take off (as it is termed) the estreat in that particular instance. Supposing the authority of the court to have been thus exercised, what is to follow must depend on the circumstances of each particular case. If appearance in court were the only object to be obtained, that appearance may be attended with all the consequences in contemplation; or a respite of the question to be discussed may be granted by the same authority which has superseded the estreat; or a new recognizance may be required in open court; or, lastly, if the affidavit be insufficient to procure these consequences, the estreat will be confirmed.

Recogni-
zances, breach
of.

By sect. 9 (1) of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), where a recognizance is conditioned for the appearance of a person before a court of summary jurisdiction or otherwise in connection with a court of summary jurisdiction as in the section mentioned, such court if the said recognizance appears to the court to be forfeited may declare the recognizance to be forfeited and enforce payment of the sum due. And by sect. 9 (2), where a recognizance conditioned to keep the peace or to be of good behaviour, or not to do or commit some act or thing, has been entered into by any person as principal or surety before a court of summary

(*a*) See *R. v. Mayor, &c. of Dover* (1835), 5 T_YT. 279.

(*b*) See *R. v. Justices of Ely* (1855), 25 L. J. M. C. 1.

jurisdiction, that court or any other court of summary jurisdiction acting for the same county, borough or place may, by conviction, adjudge the recognizance to be forfeited. And by sect. 9 (3), except where a person seeking to put in force a recognizance to keep the peace or to be of good behaviour by notice in writing requires such recognizance to be transmitted to a court of general or quarter sessions, the recognizances to which this section applies shall be dealt with in manner in this section mentioned, and notwithstanding any enactment to the contrary shall not be transmitted, nor shall the forfeiture thereof be certified to general or quarter sessions.

Order of
estreat when
to be made.

Under 3 Geo. 4, c. 46, where a party, appealing against a refusal to grant him a licence, entered into a recognizance to abide the order of the court of quarter sessions, and pay such costs as might be awarded at the Michaelmas sessions, and at such sessions judgment was given against him, and an order made that he should pay the costs, which he failed to do, the following Epiphany sessions had jurisdiction to order the estreat (c).

Form of
recognizance
before justice
of the peace.

By sect. 4, every justice of the peace before whom any recognizance shall be entered into or taken, is required to give or cause to be given at the time of entering into such recognizance to the person or persons surety or sureties so entering into the same, and to each of them, a written or printed paper or notice (d). And each and every such justice shall, in such recognizance, state and particularly specify not only the profession, art, mystery or trade, of every person so entering into such recognizance, together with their christian name and names and surnames, but also the parish, township or place of his, her or their residence, and, in case such residence shall be in any city, town or borough, shall also state and particularly specify the name of the street and number of the house (if any) in which such persons shall reside, and also whether owner or tenant thereof or lodger therein (e).

Party to be
discharged
out of custody
on giving
security to
sheriff.

And by sect. 5, it is provided that, if any person on whose goods and chattels such sheriff, bailiff or officer, shall be authorized to levy any such forfeited recognizance or sum of money to be paid in lieu or in satisfaction thereof, shall give security to the said sheriff, bailiff or officer, for his appearance at the next general or quarter sessions, then and there to abide the decision of the court, and also to pay such forfeited recognizance or sum of money to be paid in lieu or satisfaction thereof, together with all such expenses as shall be ordered and adjudged by the Court, it shall be lawful for such sheriff, bailiff or officer, and he is hereby required to discharge such person so giving security out of custody: provided also, that

(c) *R. v. Justices of Ely* (1855), 25 L. J. M. C. 1.

(d) For form of recognizance, see 11 & 12 Vict. c. 42, Schedule.

(e) And see 11 & 12 Vict. c. 42, s. 20.

in case such party so giving security shall not appear in pursuance of his undertaking, it shall be lawful for the court forthwith to issue a writ of *distringas* and *capias*, or *fieri facias* and *capias*, against the surety or sureties of the person so bound as aforesaid.

And by sect. 6, the court of general and quarter sessions, before whom any person so committed to gaol or bound to appear shall be brought, is hereby required to inquire into the circumstances of the case, and shall, at its discretion, be empowered to order the discharge of the whole of the forfeited recognizance or sum of money paid or to be paid in lieu or satisfaction thereof; and such order shall be made in the form or to the effect of the schedule to the Act, and shall be signed by the clerk of the peace, which said order shall be a discharge to such sheriff, bailiff or officer on the passing of his accounts at the exchequer, or before any auditor or other proper officer duly authorized to pass the same; and in all cases where the party shall have been lodged in the common gaol by such sheriff, bailiff or other officer, the justices of the peace so assembled are hereby empowered either to remand such party to the custody of the sheriff, &c., or upon the release of such party from the whole of such forfeited recognizance, to order such party to be discharged from custody; and such order shall be a full and sufficient discharge to the said sheriff, &c., on the passing of his account at the exchequer, &c.; and it shall be lawful to and for the said court of general or quarter sessions to award such costs, charges and expenses, to be paid by either party to the other, as to the said court shall seem just and reasonable.

Sessions may order the discharge of the forfeited recognizance.

And by sect 8, the said sheriff, &c. shall, at the opening of the court, return the said writ, and shall state on the back of the said roll what shall have been done in the execution of such process.

By 4 Geo. 4, c. 37, s. 1, passed to amend 3 Geo. 4, c. 46, it shall be lawful for the justices assembled at any general or quarter sessions of the peace, and they are required at the following or any subsequent general or quarter sessions held after the return of the writ and roll issued from any preceding general or quarter sessions, at the opening of the court, to insert or cause to be inserted in any following roll all such fines, issues, amerciaments, forfeited recognizances, sum or sums of money, to be paid in lieu or satisfaction of them, or any of them, which have not been duly levied or recovered, or properly accounted for by the sheriff, &c., or have not been discharged on appeal before the general or quarter sessions, or by sign manual, warrant or authority of three commissioners of the treasury, and so to continue such process from sessions to sessions, till it shall be duly ascertained to the satisfaction of the said commissioners of the treasury that the party in default has not any goods or chattels, lands or tenements, in the county, division, city, borough or place on

which a levy can be made, nor in any other county, &c.; and that he is not to be found, or that his body cannot be lodged in gaol.

And by 4 Geo. 4, c. 37, s. 3, where the party has removed from the county, &c. of the sheriff to whom the writ is issued, he may issue his warrant with a copy of the writ to another sheriff, &c. to be executed.

Recogni-
zances to keep
the peace or
be of good
behaviour,
when for-
feited.

It seems imperative on the court of quarter sessions, by the clerk of the peace, to put the law in motion, to levy the amount of all recognizances forfeited at the quarter sessions (*f*), that is, if ordered by them to be estreated (*g*); and now, by 16 & 17 Vict. c. 30, s. 2, where any recognizance to keep the peace or be of good behaviour, is entered into by any person as principal or surety before the court of general or quarter sessions of the peace of any county, riding, division, city, borough or place, or before any justice or justices of any county, riding, division, city, borough or place, it shall be lawful for any such court of general or quarter sessions of the peace as aforesaid, upon application made to such court, to declare such recognizance to be forfeited, upon proof of a conviction of the party bound by such recognizance of any offence which is in law a breach of the condition of the same; and upon further proof that a notice in writing, signed by the person seeking to put such recognizance in force, has, seven clear days before the commencement of such sessions, been personally served upon or left at the usual place of abode of the party or each of the parties, if more than one, who entered into such recognizances, that an application will be made to the said general or quarter sessions that the said recognizance shall be declared forfeited; and if such recognizance shall be declared forfeited, all such proceedings shall be had thereon as in the case of a recognizance forfeited at such court of general or quarter sessions; and all the provisions of 3 Geo. 4, c. 46, and 4 Geo. 4, c. 37, applicable to a recognizance so forfeited at such court shall apply to a recognizance which shall, upon such application and proof as is hereinbefore mentioned, be declared to be forfeited; and upon notice in writing of such intended application to the said general or quarter sessions being given to any justice or justices before whom any such recognizance shall have been taken, four clear days before the commencement of the said sessions the said justice or justices shall transmit the said recognizance to the clerk of the peace of the county, riding, division, city, borough or place within which the said recognizance shall have been taken, with a certificate that the said recognizance is sent to him by

(*f*) *R. v. Justices of Yorkshire (West Riding), In re Thornton* (1837), 7 A. & E. 591.

(*g*) 7 Geo. 4, c. 64, s. 31, not cited in *R. v. Justices of Yorkshire (West Riding)*, *sup.*

reason of such last-mentioned notice having been so given as aforesaid (*h*).

And see, further, as to the recognizance to keep the peace and be of good behaviour, *ante*, p. 395.

With respect to the duties of the clerk of the peace as to estreating recognizances, see further, *ante*, p. 69; and with respect to the duties of the sheriff in the same matter, *ante*, p. 54.

With the ulterior proceedings in the Court of King's Bench on estreated recognizances we have nothing here to do, except to observe that, till they are so estreated, that court will exercise no jurisdiction (*i*), and that a motion to discharge a defendant from estreated recognizances must be preceded by a notice to the solicitor of the treasury (*k*). If a party taken in execution on a recognizance so estreated denies its existence, he must traverse it in the exchequer (*l*).

Courts of summary jurisdiction have certain powers granted to them by the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 9), of declaring certain recognizances forfeited and of enforcing payment of the sum due thereunder, and (by s. 9, sub-s. 3) such forfeited recognizances shall not be transmitted to quarter sessions, nor shall the forfeiture be certified to quarter sessions, unless the person seeking to put in force such recognizance by notice in writing requires the same to be transmitted.

(*h*) See *ante*, p. 407.

(*i*) *R. v. Thompson* (1832), 3 Tyr. 87, and other cases cited, *ante*, p. 71.

(*k*) *Ex parte Stowell* (1844), 13 L. J. Ex. 328.

(*l*) *Re Tipton* (1834), 3 Dowl. P. R. 177. A *constat* from the estreat office is also requisite: *R. v. Holden* (1833), 3 Tyr. 580.

CHAPTER XII.

OF APPEALS AGAINST THE COUNTY RATE.

THE powers of quarter sessions as to the making and levying of the county rate, regulated by 15 & 16 Vict. c. 81, are now taken away by the Local Government Act, 1888 (51 & 52 Vict. c. 41, s. 3, sub-s. 1), but by sect. 8, sub-sect. 1 of that Act, nothing in the Act is to transfer to a county council any business of the quarter sessions or justices in relation to appeals by any overseers or persons against the basis or standard for the county rate, or against that or any other rate; the right of appeal therefore conferred by 15 & 16 Vict. c. 81, and the procedure thereunder still remains in force.

Appeal
against basis.

By sect. 17 of that Act, if at any time after the said basis or standard (of the county rate) has been allowed, confirmed and made, any overseer or overseers of the poor, or other person charged with the collection and levy of county rate in any parish or place, or inhabitant or inhabitants thereof, have reason to think that such parish, township or place is aggrieved by any such basis or standard, whether it be on account of some one or more of such parishes, townships or places being without sufficient cause omitted altogether from the said basis or standard, or on account of such parish, township or place being rated on a sum beyond the full and fair annual value of the property therein liable to be assessed toward the county rate, or on account of some other parish or parishes, township or townships, place or places, being rated on a sum less than the full and fair annual value of the property therein liable to be assessed towards the county rate, such overseer or overseers of the poor, constable, or other person, or inhabitant or inhabitants, may appeal to the justices of the peace for the county at any quarter sessions to be holden after the sessions at which such basis or standard was allowed and confirmed, against such part only of the said basis or standard as may affect the parish or parishes, township or townships, place or places which appear to be over-rated or under-rated, or omitted altogether from the said basis or standard as aforesaid (subject to the provisions hereinafter contained); and if in any case where any overseer or overseers, constable, or other person as aforesaid of one parish or place appeals against the basis or standard of rate on any

Notice of
appeal.

other parish or place, on account of the same being altogether omitted from such basis or standard, or on account of the same being rated at less than the full and fair annual value thereof as aforesaid, such overseer or overseers, constable, or other person shall give twenty-one days' notice in writing previous to the first day of the said session at which such appeal shall be made, of the intention to appeal, and of the cause and matter thereof, to the overseers of the poor; or where there are no such overseers to the person charged with the collection and levy of county rate in such other parish or place; and if in any case where any such overseer or overseers, constable, or other person appeal against the said basis or standard on the ground that any parish, township or place is rated on a sum beyond the full and fair annual value of the rateable property therein, such overseer or overseers, constable, or other person shall give twenty-one days' notice thereof in writing, with the cause and matter thereof, to the clerk of the peace of the county, the said justices shall be empowered to hear and determine such appeal in manner by this Act directed, and either to confirm such parts of the basis or standard as have been appealed against, or to correct such inequalities or omissions as shall be proved to exist therein, in such manner as to them the said justices may appear fair, just and equitable; but no such basis or standard shall upon any appeal be quashed or destroyed, in regard to any other parish, township or place, unless in cases where the justices of the peace in quarter sessions assembled, or the major part of them, deem it necessary to proceed to the making of an entire new basis or standard, and where they proceed therein according to the provisions of this Act.

By 15 & 16 Vict. c. 81, s. 18, it shall be lawful for the court of quarter sessions of the peace, upon any such appeal, instead of hearing the said appeal, to adjourn the same, and to order, upon the application of the appellant or respondent in such appeal, a survey and valuation of any of the parishes, townships or places, or any parts thereof, in respect of or relating to which any such appeal shall be made, and to fix the next or some subsequent session for receiving such survey and valuation, and for hearing and determining the said appeal, and such court shall also thereupon appoint a proper person or persons to make such survey and valuation; and the person or persons so appointed shall for that purpose have full power, with or without assistants, to enter upon, view and examine, survey, measure and value all and any lands, houses and property liable to be assessed toward the county rate within the parishes, townships and places mentioned in such order; and such survey and valuation shall be reported to the quarter session, or adjournment, fixed as aforesaid for receiving the same; and the court then and there assembled shall hear and determine the said appeal in the manner hereinbefore set forth.

Hearing and
determining
appeals.

Sessions to determine costs of appeal and of valuation ordered by sessions.

By 15 & 16 Vict. c. 81, s. 19, the charges and expenses of and attending any survey and valuation ordered to be made by any court of quarter sessions in such appeal as aforesaid shall be deemed costs in such appeal, and abide the event thereof; and the court before which any such appeal is heard and determined may order the costs in and about such appeal to be paid by either party, appellant or respondent, as they in their discretion may think fit; but where any appeal is made on the ground that any parish, township or place is rated on a sum beyond the full and fair annual value of the property therein, if the court before which such appeal is heard determine in favour of the appellants, such court shall ascertain the costs and charges incurred by such appellants in and about such appeal, and shall order the treasurer of the county rates to pay the same to such appellants out of the public stock of the county in his hands.

Parishes, &c. aggrieved may appeal.

By 15 & 16 Vict. c. 81, s. 22, if the churchwarden or churchwardens, overseer or overseers of the poor, or other inhabitant or inhabitants of any parish, township or place, whether parochial or otherwise, where there is no churchwarden or overseer, or person appointed to act as such, shall at any time thereafter have reason to think that such parish, township or place is aggrieved by any rate or assessment now existing, or hereafter to be made upon the basis or standard hereinbefore mentioned, either in pursuance of this Act or of any Act or Acts now in force, whether it be on account of the proportions assessed upon the respective parishes, townships or places being unequal, or on account of some one or more of them being without sufficient cause omitted altogether from the rate, or on account of such parish, township or place being rated at a higher proportion of the pound sterling according to the fair annual value of the rateable property therein, or on account of some other parish or parishes, township or townships, place or places being rated at a lower proportion of the pound sterling according to the fair annual value of the rateable property therein than has been fixed and declared by the justices of the peace of the said county in sessions assembled as the basis of the rate of the said county, or on account of the altered state of the value of the property assessed, or any part thereof, or shall have any other just cause of complaint whatsoever, it shall be lawful for such churchwarden or churchwardens, overseer or overseers of the poor, or other inhabitant or inhabitants where there is no churchwarden or overseer, or person appointed to act as such, to appeal to the justices of the peace for the county at the next quarter sessions of the peace after such cause of appeal shall have arisen, against such part of the rate only as may affect the parish or parishes, township or townships, place or places which are unequally rated, or which shall appear to be over-rated or under-rated, or omitted altogether from the rate: provided always, that fourteen clear days'

Grounds of appeal against a county rate.

Notice of appeal.

notice in writing previous to the first day of such last-mentioned quarter sessions shall be given by the parties intending to appeal to the parties against whose rate the appeal is to be made, also to the clerk of the peace of the county, and the hundred constable, of the grounds of such appeal and the intention to try such appeal at such quarter sessions of the peace; and the said justices are hereby empowered to hear and finally determine the same, and either to confirm such parts of the rate as have been appealed against, or to correct such inequalities, disproportions or omissions as shall be proved to exist therein, as well in respect of the basis or standard as in the assessment of the rate made thereon, in such manner as to them the said justices shall appear fair, just, and equitable, anything in this Act, or any former Act or Acts, or any law, usage, or custom, to the contrary thereof notwithstanding: provided nevertheless, that upon such appeal no such rate shall be quashed or destroyed in regard to any other parish, township, or place, unless in cases where the justices of the peace of any county in quarter sessions assembled, or the major part of them, shall deem it necessary to proceed to the making of an entire new rate, and shall proceed therein, according to the provisions of this Act.

Judgment of the sessions on appeal.

By 15 & 16 Vict. c. 81, s. 24, save as hereinbefore otherwise provided, in case of any appeals, actions, suits or proceedings at law respecting anything done in pursuance of this Act, or any other Act or Acts relating to the county rate, the expenses of all such appeals, actions, suits or proceedings at law shall be borne and paid by such respective parishes, townships, places and persons, or such of them, and in such proportions, as the said justices shall, as they are hereby authorised to do, upon any appeal, in their quarter sessions award and order, or as such courts wherein such actions, suits or proceedings shall be instituted shall, as they are hereby authorised to do, adjudge and order.

Expenses of appeals.

By sect. 25, and for the more effectual preventing of frivolous appeals, it is enacted, that the justices of the peace in their quarter sessions assembled, upon proof before them there to be made of notice of any appeal having been given as hereinbefore authorised by any churchwarden or churchwardens, overseer or overseers, or other person or persons (though he or they did not afterwards prosecute such appeal), shall and may at the same sessions award and order to the party to whom such notice shall appear to have been given, such costs and charges as by the said justices in their discretion shall be thought reasonable and just to be paid by the churchwardens, overseers, or any other person by whom such notice shall have been given.

Costs may be awarded upon notices of appeal not prosecuted.

By sect. 33, any person assessed to any rate made under the authority of the provisions of that Act may appeal against the same, in like manner, and with the like con-

Appeal against the rate, and

audit of the
accounts.

sequences in all respects, and subject to the same provisions and regulations, as in appeals against the poor rate; and every overseer and collector shall account for the money levied, collected and expended under the authority of this Act to the auditor of the district comprising such parish or place, in like manner as for the poor rate, and if any balance be found to be in his hands shall apply the same towards the next county rate required for the like purpose of this Act, or shall pay the same to his successor in office; and in default of his so applying the same while in office, or making payment to his successor within seven days after the balance shall have been found, such auditor shall proceed to recover the same from the person holding the same, in like manner as sums certified by him to be due from persons accounting shall from time to time be recoverable, and he shall be paid his costs and expenses, when not recovered from the defendant, by the then overseers of the parish or place, who shall be reimbursed out of the balance of such rate, or, if need be, out of the next rate.

CHAPTER XIII.

WRIT OF PROHIBITION.

BLACKSTONE in his Commentaries, Vol. 3, p. 112, defines a writ of prohibition as a writ directed to the judge and parties of a suit in any inferior court commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.

According to Lord Blackburn(*a*), prohibition is the common law proceeding by which any of the temporal courts at Westminster (now any judge of the High Court) are enabled to restrain any of the inferior courts, but it does not enable the temporal court to act as a court of appeal from the inferior court so as to correct any irregularity or even injustice which may have been done by the inferior court if done in exercise of its jurisdiction.

The jurisdiction to grant prohibition is now conferred by the Judicature Acts upon every judge of the High Court; but inasmuch as one of the main objects of the Acts (Judicature Act, 1873, s. 24, sub-s. 7) is to enable the court to decide, if possible in one proceeding, all the questions in dispute in the same matter, and between the same parties, and (Judicature Act, 1873, s. 25, sub-s. 8) to grant an injunction in all cases in which it shall appear to the court just and convenient so to do, the court may, in any case in which it has power to grant prohibition, grant an injunction to restrain the proceedings in the inferior court (*b*).

Where an inferior court proceeds in a cause properly within its jurisdiction, no prohibition can be awarded till the pleadings raise some issue which the court is incompetent to try, but where the foundation for the jurisdiction is itself defective, a prohibition may be applied for at once (*c*).

Prohibition may issue to control a court of criminal jurisdiction equally as a court exercising civil jurisdiction (*d*).

(*a*) *Macdonochie v. Lord Penzance* (1881), 6 App. Cas. 424, at p. 443.

(*b*) *Hedley v. Bates* (1880), 13 C. D. 498.

(*c*) *London Corporation v. Cox* (1867), L. R. 2 H. L. 239.

(*d*) *R. v. Herford* (1860), 29 L. T. 249, *per* Lord Cockburn, C. J., at p. 255.

With respect to the civil jurisdiction of quarter sessions, prohibition has been issued to stay further proceedings on an appeal which had not been commenced within the time limited by statute (*e*).

Where justices have jurisdiction over the subject-matter of the proceedings before them, a prohibition cannot be issued upon the ground that they make a mistake in law in exercising their jurisdiction, but if the matter be not within their jurisdiction then a prohibition must go (*f*).

The question whether the writ is of right or is in the discretion of the court, and, if the latter, to what extent the conduct of the applicant in the court below may debar him from obtaining the issue of the writ, is well treated by Willes, J., in his opinion given in the House of Lords (*g*), in which he says that "upon an application being made in proper time, upon sufficient materials, by a party who has not by misconduct or laches lost his right, its grant or refusal is not in the mere discretion of the court," and further (*h*), "where, however, the defect is not apparent, and depends on some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the court below, and he has thought proper, without excuse, to allow that court to proceed to judgment without setting up the objection, and without moving for a prohibition in the first instance, although it would seem that the jurisdiction to grant a prohibition in respect of the right of the crown is not taken away, for mere acquiescence does not give jurisdiction (*i*), yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ though of right is not of course, the court would decline to interpose, except perhaps upon an irresistible case, and on excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant," and this judgment was considered and approved in *Farquharson v. Morgan* (*k*), where on a total absence of jurisdiction appearing on the face of the proceedings in an inferior court, the Court of Appeal held itself bound to issue a prohibition, although the applicant for the writ had consented to or acquiesced in the exercise of jurisdiction by the inferior court; and this latter judgment has again been approved and followed in the latest cases (*l*).

On the hearing the decision of the inferior court on facts going to its jurisdiction is reviewable. Thus where a recorder

(*e*) *Pomfray's case* (1628), Litt. 163.

(*f*) *R. v. Kent JJ. or Bromley JJ.* (1889), 24 Q. B. D. 181.

(*g*) *London Corporation v. Cox* (1867), L. R. 2 H. L. 239, at p. 279.

(*h*) At p. 283.

(*i*) *Knowles v. Holden* (1855), 24 L. J. Ex. 223.

(*k*) *Farquharson v. Morgan*, [1894] 1 Q. B. 552.

(*l*) *Alderson v. Pallisser*, [1901] 2 K. B. 833; *R. v. Tristram*, [1902] 1 K. B. 816 (C. A.).

had allowed an appeal against a rate to be entered and respited at October sessions, on the ground that sessions held in September were not the next practicable sessions, on a rule to show cause why a writ of prohibition should not issue to prohibit the recorder from trying the appeal, the court is competent to review the facts on which the recorder held he could enter the appeal at the October sessions (*m*).

By the Crown Office Rules, 1886, r. 81, an application for a writ of prohibition on the Crown side shall be made by motion to a Divisional Court for an order *nisi* in all criminal causes or matters; and in civil proceedings on the Crown side by motion for an order *nisi* or by summons before a judge at chambers. By Order 82, the order may be made absolute *ex parte* in the first instance on special circumstances being shown, in the discretion of the court or judge.

No summons to show cause in prohibition before a judge at chambers shall be issued without leave of a judge (C. O. R. 1886, r. 305).

Leave of the judge is obtained on an *ex parte* application, and the summons is issued from, and the order drawn up at, the Crown Office (C. O. R. 1886, r. 304).

The application for the writ must be supported by affidavit intituled "In the High Court of Justice, King's Bench Division" (C. O. R. 1886, r. 7, and R. S. C. Ord. 68, r. 4), and if it is not so intituled, the court may refuse to hear the application (*n*).

When pleadings in prohibition are ordered, the pleadings and subsequent proceedings, including judgment and assessment of damages, if any, shall be, as nearly as may be, the same as in an ordinary action for damages (C. O. R. 1886, r. 127; R. S. C. Ord. 68, r. 3).

It is now clear that the court has power either in refusing or making absolute a rule for prohibition without pleadings to give costs to the successful party (*o*).

(*m*) *Liverpool Gas Co. v. Everton Overseers* (1871), L. R. 6 C. P. 411.

(*n*) *R. v. Plymouth and Dartmoor Railway* (1889), 37 W. R. 334.

(*o*) *R. v. Justices of London County and London County Council*, [1894] 1 Q. B. 453.

LIST OF GENERAL STATUTES UNDER WHICH APPEALS LIE TO QUARTER SESSIONS.



STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
ADULTERATION of Drink.		
Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63, s. 23)	Any person convicted	Next general or quarter sess.
Adulteration of Food.		
Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63, s. 23)	Any person convicted	Next general or quarter sess.
Margarine Act, 1887 (50 & 51 V. c. 29, s. 12)	Incorporates 38 & 39 Vict. c. 63, s. 23.	
Adulteration of Seeds.		
Adulteration of Seeds Act, 1869 (32 & 33 Vict. c. 112, s. 6)	Any person convicted think- ing himself aggrieved.	do. do.
AGRICULTURAL Gangs.		
Agricultural Gangs Act, 1867 (30 & 31 Vict. c. 130, s. 7)	Any person aggrieved by refusal of justices to grant licence.	Next practicable general or quarter sessions.
Agricultural Holdings.		
Agricultural Hold- ings (England) Act, 1883 (46 & 47 Vict. c. 61, s. 46)	Any person aggrieved by any decision.	General or quarter sessions.
ANCIENT Monuments.		
Ancient Monuments Protection Act, 1882 (45 & 46 V. c. 73, s. 7)	In England any person ag- grieved by any decision.	Quarter sessions.
3 Edw. 7, c. 37, s. 14	Extends above powers to Ire- land.	

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
ANIMALS (Cruelty to).		
Cruelty to Animals Act, 1819 (12 & 13 Vict. c. 92, s. 25)	Any person who shall think himself aggrieved by conviction wheresum adjudged to be paid exceeds 2 <i>l</i> .	Next court of general or quarter sessions holden not less than 14 days after day of conviction for the county, borough or other jurisdiction wherein the cause of appeal shall have arisen.
Cruelty to Animals Act, 1876 (39 & 40 Vict. c. 77, s. 16)	In England any party thinking himself aggrieved by any conviction.	Next court of quarter sess.
Animals (Diseases of).		
Diseases of Animals Act, 1894 (57 & 58 Vict. c. 57, s. 55)	Any person thinking himself aggrieved by the dismissal of a complaint by, or by any determination or adjudication of a court of summary jurisdiction. [This includes a prosecutor on an acquittal.]	Quarter sessions.
Animals (Feeding of).		
Fertilisers and Feeding Stuffs Act, 1893 (56 & 57 Vict. c. 56, s. 7 (2))	Any person aggrieved by a summary conviction.	Quarter sessions.
APPRENTICES.		
Parish Apprentices (32 Geo. 3, c. 57, s. 14)	Any person aggrieved	Next general or quarter sess.
Masters ill-using Apprentices (33 Geo. 3, c. 55)	Any person aggrieved by imposition of fine or order, or warrant of distress, or any act done in the execution of such warrant of distress.	do. do.
Abandoning Apprentices (56 Geo. 3, c. 139, s. 17)	Any person who shall be dissatisfied with any act done by any J.P. in the execution of this Act.	Any court of general or quarter sessions.
BASTARDY.		
Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76, s. 103)	Any person aggrieved by any order or conviction, or any person aggrieved by order made on him as the putative father of a bastard child.	Next general or quarter sess.
Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101, s. 4) (See also 8 & 9 Vict. c. 10)	Such putative father	General quarter sessions.
Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65, s. 9)	Putative father	Quarter sessions.

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
BATHS and Washhouses.		
The Baths and Wash-houses Act, 1846 (9 & 10 Vict. c. 74, s. 30)	Every person aggrieved by any bye-law, order, direction or appointment of or by council or commissioners.	Like power of appeal to the general quarter sessions, as under the provisions of the Companies Clauses Consolidation Act, 1845, incorporated with this Act.
BEERHOUSE. See INTOXICATING LIQUORS.		
BETTING Houses.		
The Betting Act, 1853 (16 & 17 Vict. c. 119, s. 13)	Any person summarily convicted.	Next general or quarter sess.
BILLIARD Rooms.		
Gaming Act, 1845 (8 & 9 Vict. c. 109, s. 20)	Any person summarily convicted.	Next general or quarter sess.
Licensing Act, 1872 (35 & 36 Vict. c. 94, s. 52)	Any person feeling aggrieved by any order or conviction.	Next quarter sessions.
BIRTHS, Marriages and Deaths.		
Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86, s. 46)	Where sum adjudged to be paid on summary conviction shall exceed 5 <i>l.</i> any person convicted.	Next court of quarter sess.
Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88, s. 52)	Incorporates unrepealed part of last-named Act.	
BOROUGH Constables.		
Assaulting and Resisting.		
Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50, s. 219 (2))	Any person aggrieved by a conviction.	Quarter sessions.
Neglect of Duty.		
Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50, s. 219 (2))	do.	do.
	do.	do.
<i>See also</i> POLICE—TOWNS, &c.		
BREAD.		
Bread Act, 1836 (6 & 7 Will. 4, c. 37, s. 25)	Any person convicted of any offence punishable by this Act thinking him, her or themselves aggrieved by the judgment of the magistrates.	Next general or general quarter sessions.

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
BRIDGES.		
55 Geo. 3, c. 143, s. 4	Person thinking himself aggrieved by anything done in pursuance of the Act.	Within three calendar months next after cause of complaint arose to any general quarter sessions.
BURIAL.		
48 Geo. 3, c. 75. s. 10	Any person thinking himself aggrieved by any judgment or determination, or by any matter or thing done in pursuance of this Act.	First general or quarter sess.
<i>See also CEMETERIES.</i>		
BUTTONS—Metal.		
36 Geo. 3, c. 60, s. 9	Person thinking himself aggrieved by judgment of justices.	Next general quarter sess.
CANALS and Rivers.		
3 & 4 Vict. c. 50. s. 19	In every case of summary conviction in which the penalty shall be more than 3 <i>l.</i> any person thinking himself aggrieved.	Next general or quarter sess.
CEMETERIES.		
Cemeteries Clauses Act (10 & 11 Vict. c. 65, s. 62)	Incorporates sect. 157 of the Railways Clauses Act, 1845 (8 & 9 Vict. c. 20). Any party aggrieved.	General quarter sessions.
CHILDREN (Prevention of Cruelty to).		
Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41, s. 19)	Any person convicted and such person did not plead guilty or admit the truth of the information, or when in case of any application under sects. 6, 7 or 8 other than an application to a Judge or Court of Assize, any party thereto thinks himself aggrieved by any order or decision.	In England and Ireland to a court of quarter sessions. In Scotland to the High Court of Justiciary.
Children (Sale to). <i>See</i> INTOXICATING LIQUORS (SALE TO CHILDREN) ACT, 1901.		
CHIMNEY Sweepers and Chimneys.		
Chimney Sweepers & Chimneys Regulation Act, 1840 (3 & 4 Vict. c. 85, s. 11)	Any person who shall think himself or herself aggrieved by any conviction.	Next general or quarter sess.
Chimney Sweepers Regulation Act, 1864 (27 & 28 Vict. c. 37, s. 4)	Incorporates 3 & 4 Vict. c. 85, s. 11.	
Chimney Sweepers Act, 1875 (38 & 39 Vict. c. 70, s. 20)	Any person deprived of his certificate under sect. 11 of 3 & 4 Vict. c. 85.	

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
CHURCH or Chapel Brawling.		
52 Geo. 3, c. 155, s. 16	Any person convicted who shall conceive himself aggrieved.	General or quarter sessions.
Ecclesiastical Courts Jurisdiction Act, 1860 (23 & 24 Vict. c. 32, s. 4)	Any person convicted who shall think himself aggrieved.	Next court of general or quarter sessions.
COLLIERS. <i>See MINES.</i>		
COMBINATION of Workmen. <i>See MASTER AND SERVANT.</i>		
COMMISSIONERS Clauses Act, 1847.		
10 & 11 Vict. c. 16, s. 104	Incorporates Railways Clauses Act, 1845 (8 & 9 Vict. c. 20). Sect. 157 of that Act gives right of appeal to any party aggrieved.	General quarter sessions.
COMMONS (Inclosure).		
Inclosure Act, 1845 (8 & 9 Vict. c. 118, s. 63)	Any person within 4 months after the first Sunday on which notice shall be given on the church door.	Quarter sessions.
COMPANIES Clauses Consolidation Act, 1845.		
8 & 9 Vict. c. 16, s. 159	Any party feeling aggrieved by any determination or adjudication.	General quarter sessions.
CONSPIRACY and Protection of Property.		
Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86, s. 12)	In England or Ireland any party feeling aggrieved by any conviction.	do. do.
CONSTABLES.		
Disobeying Warrant of Justice, &c.		
33 Geo. 3, c. 55, s. 1	Any person aggrieved by imposition of fine, or by any order or warrant of distress for levying same.	Next general or quarter sess.
Neglecting Duty under Vagrant Act.		
5 Geo. 4, c. 83, s. 14	Any person aggrieved by any act or determination of any justice.	do. do.
<i>See also POLICE.</i>		

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
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CORN (Misappropriation by Servants).

26 & 27 Vict. c. 103. s. 2	Any person thinking himself aggrieved by any conviction.	Next court of general quarter sessions.
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CORRUPT and Illegal Practices Prevention Act, 1883.

46 & 47 Vict. c. 51, s. 54	A person aggrieved by a conviction.	General or quarter sessions.
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COUNTY RATE.

15 & 16 Vict. c. 81, ss. 17, 19	After basis allowed, confirmed and made, if overseer or other person charged with collection in any parish or place have reason to think parish. &c. aggrieved.	Any quarter sessions held after basis allowed.
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CUTLERS.

59 Geo. 3, c. 7, s. 9	Any person or persons thinking himself, herself, or themselves aggrieved by judgment of justices.	Next general quarter sess.
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DISSENTERS.

52 Geo. 3, c. 155, s. 16	Any person convicted who shall conceive himself aggrieved.	General or quarter sessions.
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DISTRESS.

11 Geo. 2, c. 19, s. 5	Any person who thinks himself aggrieved by order of justices.	Next general or quarter sess.
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DRUNKARD (Habitual). *See* HABITUAL DRUNKARD.

EMPLOYERS and Workmen. *See* FRAUD—MASTER AND SERVANT.

EXCISE.

53 & 54 Vict. c. 21, s. 21	Persons aggrieved.	Same power of appeal as under any Act relating to the excise.
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See also REVENUE.

EXPLOSIVES.

Explosives Act, 1875 (38 & 39 Vict. c. 17, s. 93)	Any party feeling aggrieved by any summary order, or any order or conviction by which the sum adjudged to be paid exceeds £20.	Quarter sessions.
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STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
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FACTORIES.

Factory and Workshop Act, 1901 (1 Edw. 7, c. 22, s. 145)	Any person aggrieved by a conviction or order.	Quarter sessions.
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FERTILISERS.

Fertilisers and Feeding Stuffs Act, 1893 (56 & 57 Vict. c. 56, s. 7 (2))	Any person aggrieved by a summary conviction.	Quarter sessions.
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FISHING.

Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121, s. 66)	Any person feeling aggrieved under Salmon Fishery Acts, 1861 or 1865, or either of them.	General or quarter sessions.
Sea Fisheries Act, 1868 (31 & 32 Vict. c. 45, s. 58)	do. do.	
Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71, s. 2)	Incorporated with above Acts.	
Salmon Fishery Act, 1876 (39 & 40 Vict. c. 19, s. 2)	do. do.	
Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39, s. 2)	do. do.	
Freshwater Fisheries Act, 1884 (47 & 48 Vict. c. 11, s. 6)	do. do.	
Salmon and Freshwater Fisheries Act, 1892 (55 & 56 Vict. c. 50)	do. do.	
Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22, s. 16)	Any person feeling aggrieved by any conviction, or by any determination or adjudication, when fine exceeds 5 <i>l.</i> or period of imprisonment exceeds one month.	In England, quarter sessions in manner provided by S. J. (English) Acts. In Ireland, quarter sessions in manner directed by the Petty Sessions (Ireland) Act, 1851, and amending Acts. In Scotland, Isle of Man and Channel Islands, to the court, and in the manner in which appeals from like convictions and determinations and adjudications are made.

STATUTES GRANTING.	TO WHOM GIVEN. °	TO WHAT COURT.
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FOOD and Drugs (Sale of).

Sale of Food and
Drugs Act, 1875
(38 & 39 Vict. c. 63,
s. 23)

See ADULTERATION.

FRAUD.

Frauds by Workmen, 1748 (22 Geo. 2, c. 27, s. 6)	Any person aggrieved by judgment or order relating to sale or disposal of materi- als.	General or quarter sessions for the same county, riding, division, city or town held next after judgment given or order made.
Frauds by Workmen, 1777 (17 Geo. 3, c. 56, s. 20)	Any person thinking himself aggrieved by order or judg- ment of justices.	Next general or quarter sess.
Hosiery Act, 1843 (6 & 7 Vict. c. 40, s. 29)	Any person aggrieved by any conviction.	do. do.

FRIENDLY Societies.

Friendly Societies Act, 1896 (59 & 60 Vict. c. 25, s. 93)	Any person may appeal from any order or conviction.	In England and Ireland to quarter sessions. In Scotland in accordance with the provisions of the Summary Jurisdiction (Scotland) Act.
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GAME.

Night Poaching Act, 1828 (9 Geo. 4, c. 69, s. 6)	Any person thinking himself aggrieved by any summary conviction.	Next court of general or quarter sessions.
Game Act, 1831 (1 & 2 Will. 4, c. 32, s. 44)	do. do.	do. do.
Poaching Prevention Act, 1862 (25 & 26 Vict. c. 114, s. 6)	do. do.	do. do.

GAMING.

Lotteries Act, 1721 (8 Geo. 1, c. 2, s. 36)	Any person thinking himself aggrieved by judgment or determination of justices.	Next quarter sessions for the county, city or place where such judgment or determi- nation shall be made.
Lotteries Act, 1722 (9 Geo. 1, c. 19, s. 5)	do. do.	do. do.
Lotteries Act, 1732 (6 Geo. 2, c. 35, s. 30)	do. do.	do. do.
Gaming Act, 1738 (12 Geo. 2, c. 28, s. 5)	Any person thinking himself aggrieved by judgment or determination of any justice or mayor.	Next general quarter sessions.
Gaming Act, 1845 (8 & 9 V. c. 109, s. 20)	Any person summarily con- victed under this Act.	Next general or quarter sess.

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
Gaming—continued.		
Betting Act, 1853 (16 & 17 V. c. 119, s. 13)	Any person summarily convicted under this Act.	Next general or quarter sess.
Gaming House Act, 1854 (17 & 18 Vict. c. 38, s. 10)	Any person summarily convicted.	do. do.
Betting Act, 1874 (37 & 38 Vict. c. 15, s. 1)	Construed as one with last-named Act.	
GAS.		
Lighting and Watching Act, 1833 (3 & 4 Will. 4, c. 90, s. 66)	Any person finding himself aggrieved by any order, direction or appointment of inspectors, or order or conviction of justices.	Any general or quarter sessions for the county or place where the parish is situate.
Metropolitan Police Act, 1839 (2 & 3 Vict. c. 71, s. 50)	Any person aggrieved where penalty more than £3 or imprisonment more than one month.	Next general or quarter sess.
Gasworks Clauses Act, 1847 (10 & 11 Vict. c. 15, s. 43)	Appeal lies under 2 & 3 Vict. c. 71, s. 50.	
Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41)	To be construed with Gasworks Clauses Act, 1847.	
Sales of Gas Act, 1859 (22 & 23 Vict. c. 66, s. 22)	All persons who may think themselves aggrieved by any act or decision, order, judgment or determination.	Next practicable general or quarter sessions.
Metropolis Gas Act, 1869 (23 & 24 Vict. c. 125, s. 46)	Appeal lies under 3 & 4 Vict. c. 84, s. 12.	
GUN Barrels.		
18 & 19 Vict. c. cxlviii. s. 103 (local Act)	Person thinking himself aggrieved.	Next general or quarter sess.
GUNPOWDER. See EXPLOSIVE SUBSTANCES.		
HABITUAL Drunkards.		
Habitual Drunkards Act, 1879 (42 & 43 Vict. c. 19, s. 30)	In England any person thinking himself aggrieved by any conviction or order.	Next quarter sessions for the county, boro' or place in which the cause of appeal has arisen.
HACKNEY Carriages.		
Stage Carriages Act, 1832 (2 & 3 Will. 4, c. 120, s. 103)	Person convicted finding himself aggrieved by judgment of any justice.	General or quarter sessions.
HARBOURS Regulation.		
54 Geo. 3, c. 159, s. 26	Any person or persons convicted.	General quarter sessions within 3 calendar months next after conviction.

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
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HARBOURS Regulation—continued.

Harbours Clauses Act, 1847 (10 & 11 Vict. c. 27, s. 92)	Clauses of the Railway Clauses Consolidation Act, 1845, with respect to recovery of damages and penalties and any other matter referred to justices, incorporated with this Act.
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HAY and Straw Dealers.

36 Geo. 3, c. 88, s. 29	Any person convicted of any offence under this Act.	General or quarter sessions.
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HEALTH, Public. *See PUBLIC HEALTH.*

HIGHWAYS.

Highway Act, 1835 (5 & 6 Will. 4, c. 50, s. 105)	Any person thinking himself aggrieved by any rate made or any order, conviction, judgment or determination made, or matter or thing done, and for which no measure of relief hath been already appointed.	Next general or quarter sess.
Highways Act, 1862 (25 & 26 Vict. c. 61, s. 47)	Where penalty exceeds £5 any person aggrieved.	Quarter sessions.
Highways Act, 1864 (27 & 28 Vict. c. 101, s. 37)	Any person aggrieved by any rate levied on him on the grounds in the section stated.	General or quarter sessions.
Do. do. s. 38	Any party thinking himself aggrieved by any conviction or order.	Next practicable court of quarter sessions.
Highways and Loco- motives (Amend- ment) Act, 1878 (41 & 42 Vict. c. 77, s. 37)	Any party thinking himself aggrieved by any conviction or order.	Next practicable court of quarter sessions.

INDUSTRIAL and Provident Societies.

Industrial and Provi- dent Societies Act, 1893 (56 & 57 Vict. c. 39, s. 70)	In England or Ireland any party. In Scotland any person	Quarter sessions. In accordance with provisions of the Summary Jurisdic- tion (Scotland) Acts.
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INEBRIATES. *See HABITUAL DRUNKARDS.*

INTOXICATING Liquors Licensing.

35 Geo. 3, c. 113, s. 12	Any person thinking himself aggrieved by conviction (justices are required to in- form person at time of con- viction of right of appeal).	Next general quarter sessions.
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STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
Intoxicating Liquors Licensing—continued.		
9 Geo. 4, c. 61, s. 27	Any person thinking himself aggrieved.	Next general or quarter sess.
Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27, s. 8)	Incorporates provisions of 9 Geo. 4, c. 61.	
Licensing Act, 1872 (35 & 36 Vict. c. 94, s. 52)	Any person feeling aggrieved.	Next quarter sessions.
Licensing Act, 1874 (37 & 38 V. c. 49, s. 1)	Incorporates the Licensing Act, 1872.	
Intoxicating Liquors (Sale to Children) Act, 1901 (1 Edw. 7, c. 27, s. 4)	Incorporates the Licensing Acts, 1872—4.	
Licensing Act, 1903 (2 Edw. 7, c. 28, s. 11 (4))	Incorporates provisions of 9 Geo. 4, c. 61.	
LAND Drainage.		
Land Drainage Act, 1861 (24 & 25 Vict. c. 133, s. 47)	Person aggrieved.....	Quarter sessions.
LANDLORD and Tenant—Fraudulent Removal of Goods.		
11 Geo. 2, c. 19, s. 5	Any person who thinks himself aggrieved by any order of justices.	Next general or quarter sess.
LANDS Clauses.		
8 & 9 Vict. c. 18, s. 146	Any party feeling aggrieved by any determination or adjudication.	General or quarter sessions.
LARCENY.		
Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 110)	Where sum adjudged to be paid exceeds £5 or imprisonment adjudged exceeds one month, or conviction takes place before one justice only, any person thinking himself aggrieved by conviction.	Next general quarter sessions.
LIGHTING.		
3 & 4 Will. 4, c. 90, s. 66	Any person finding himself aggrieved by any order, direction or appointment of the inspectors, or any order or conviction of one or more justices.	Any general or quarter sessions for the county or place in which the parish shall be situate within 4 months next after the cause of complaint shall have arisen.
LODGING Houses.		
Common Lodging House Act, 1851 (14 & 15 Vict. c. 28, s. 15)	Every person feeling aggrieved by any determination of any matter referred to justices.	Appeal to general quarter sessions as provided by Railway Clauses Consolidation Act, 1845.
LOTTERIES. See GAMING.		

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
LUNACY.		
Lunacy Act, 1890 (53 & 54 Vict. c. 5, s. 301)	Any person aggrieved by refusal of order.	Quarter sessions within a reasonable time.
Do. do. s. 303	Guardians of any union feeling aggrieved by any order adjudging the settlement of a lunatic.	Quarter sessions for the county or borough on behalf of which the order has been obtained, or in which the union obtaining the order is situate, or the county or borough in which the institution for lunatics where the lunatic is confined is situate.
Do. do. s. 327	Any person aggrieved by order other than orders adjudicating as to the settlement of a lunatic pauper and providing for his maintenance.	Quarter sessions, subject to conditions and regulations of the Summary Jurisdiction Acts.
MAIL Ships.		
Mail Ships Act, 1891 (54 & 55 Vict. c. 31, s. 7 (2))	Any person who thinks himself aggrieved by a conviction.	Quarter sessions. In Scotland in manner provided by the Summary Prosecutions Appeals (Scotland) Act, 1875.
MALICIOUS Damage.		
Malicious Injuries to Property Act, 1861 (24 & 25 Vict. c. 97, s. 68)	In case fine exceeds £5 or imprisonment one month, or conviction shall take place before one justice only, any person thinking himself aggrieved.	Next general or quarter sess.
MANUFACTURES. See FRAUD.		
MARGARINE.		
Margarine Act, 1887 (50 & 51 V. c. 29, s. 12) See ADULTERATION.		
MARKETS and Fairs Clauses Act, 1847.		
10 & 11 Vict. c. 14, s. 52	Incorporates the Railway Clauses Consolidation Act, 1845.	
MASTER and Servant.		
Servants' Characters Act, 1792 (32 Geo. 3, c. 56, s. 10)	Person thinking himself aggrieved by anything done in pursuance of Act.	Next general quarter sessions.
Parish Apprentices Act, 1792 (32 Geo. 3, c. 57, s. 14) See APPRENTICES.		
56 Geo. 3, c. 139, s. 17 See APPRENTICES.		
Misappropriation by Servants Act, 1863 (26 & 27 Vict. c. 103, s. 2)	Any person thinking himself aggrieved by conviction.	Next general quarter sessions.

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
Master and Servant — <i>continued</i> .		
Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86, s. 12)	Any party feeling aggrieved by any conviction.	Some court of general or quarter sessions.
MEASURES. <i>See</i> WEIGHTS AND MEASURES.		
MERCHANDISE Marks.		
Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28, s. 2 (5))	Any person feeling aggrieved.	Quarter sessions.
MERCHANT Shipping.		
Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 682)	A person convicted, and the fine inflicted or the sum ordered to be paid exceeds 5 <i>l</i> .	Quarter sessions in manner provided by the Summary Jurisdiction Acts.
METAL Buttons.		
36 Geo. 3, c. 60, ss. 9—10	Any person thinking himself aggrieved by any judgment.	Next general quarter sessions.
METALLIFEROUS Mines. <i>See</i> MINES.		
METROPOLIS Local Management.		
18 & 19 Vict. c. 120, s. 179	Person who has paid rate charged upon him aggrieved on grounds set forth in section.	Next general or quarter sess.
So much of this section as relates to ascertaining the value of any hereditament with respect to the value of which the valuation list is conclusive is repealed by 32 & 33 Vict. c. 67, s. 77, sch. 5.		
Metropolis Management.		
18 & 19 Vict. c. 120, s. 231	Any person feeling aggrieved by any adjudication or determination.	General or quarter sessions.
Metropolis Management and Building Acts Amendment Act, 1878 (41 & 42 Vict. c. 32, s. 23)	Same right of appeal as given under last-named Act.	
Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67, ss. 19, 23)	Any ratepayer or overseer aggrieved as laid down in sect. 19.	Quarter sessions of County of London. [By sect. 42 (10) of Local Government Act, 1888, amending 32 & 33 Vict. c. 67.]
Metropolis Water.		
Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93, s. 9)	Undertakers who consider themselves aggrieved by any order or determination. (Appeal is to be in like manner and subject to like conditions as are imposed by 8 & 9 Vict. c. 20.)	General or quarter sessions for the county or place where the cause of appeal arises.

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
METROPOLITAN Gas. <i>See GAS.</i>		
MIDWIVES.		
Midwives Act, 1902 (2 Edw. 7, c. 17, s. 14)	Any woman deeming herself aggrieved.	Quarter sessions.
MILLS Regulation.		
36 Geo. 3, c. 85, s. 8	Any person finding himself aggrieved.	Next general or quarter sess.
MINES.		
Coal Mines Regulation Act, 1887 (50 & 51 Vict. c. 58, s. 63)	Any person feeling aggrieved.	Quarter sessions in manner provided by the Summary Jurisdiction Acts.
Metalliferous Mines Regulation Act, 1872 (35 & 36 Vict. c. 77, s. 32)	Any person aggrieved by any conviction by which imprisonment is adjudged, or by which sum to be paid amounts to or exceeds half the maximum penalty.	do. do.
MONEY.		
Coinage Act, 1870 (33 & 34 Vict. c. 10, s. 18)	Incorporates the Summary Jurisdiction Act, 1848.	
MOTOR Car.		
Motor Car Act, 1903 (3 Edw. 7, c. 36, s. 4 (4))	Any person under this section disqualified for obtaining a licence.	Quarter sessions in manner provided by Summary Jurisdiction Acts.
MUNICIPAL Corporations.		
45 & 46 Vict. c. 50, s. 219 (2)	Any person aggrieved by a conviction.	Quarter sessions.
MUSIC and Dancing Licences.		
53 & 54 Vict. c. 59, s. 7	Any person aggrieved (a) by any order, judgment, determination or requirement of a local authority; (b) by the withholding of any order, certificate, licence, consent or approval which may be made by a local authority; (c) by any conviction or order.	Quarter sessions in manner provided by the Summary Jurisdiction Acts.
NAVAL Artillery Volunteers.		
36 & 37 Vict. c. 77, ss. 37, 38, 39	Where sum adjudged to be paid exceeds 5 <i>l.</i> , or imprisonment awarded exceeds one month, any person against whom the adjudication is made feeling aggrieved.	In England next quarter sess. In Scotland next Circuit Court of Justiciary, or where no circuit courts to the High Court of Justiciary at Edinburgh in manner provided by 20 Geo. 2, c. 43.

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
OBSCENE Books and Prints.		
Obscene Publications Act, 1857 (20 & 21 Vict. c. 83, s. 4)	Any person aggrieved by any act or determination.	Next general or quarter sessions for the county, riding, division, city, borough, or place in which magistrate shall have acted.
OVERSEERS (Neglect of Duty by).		
33 Geo. 3, c. 55	Any person aggrieved by imposition of fine or order, or warrant of distress, or any act done in the execution of such warrant of distress.	Next general or quarter sess.
PAWNBROKERS.		
35 & 36 Vict. c. 93, s. 52	Any person thinking himself aggrieved by any conviction or order or by refusal of certificate for licence.	Some court of general or quarter sessions.
POLICE.		
Metropolitan Police Courts Act, 1839 (2 & 3 Vict. c. 71, s. 50)	Where sum adjudged shall be more than 3 <i>l.</i> , or time more than one month, any person who shall think himself aggrieved by order or conviction.	Next general or quarter sess.
City of London Police Act (2 & 3 Vict. c. 94, s. 101)	do. do.	do. do.
Police Act, 1890 (53 & 54 Vict. c. 45, s. 11)	(a) Constable where pension declared to have been forfeited. (b) Constable dismissed without pension, and any other case where constable or his widow or child claims a pension and the police authority do not admit the claim.	Next practicable court of quarter sessions for the county wherein constable last served, or where constable served in a borough having separate court of quarter sessions, then to next sessions.
POOR Rate.		
43 Eliz. c. 2, s. 6 17 Geo. 2, c. 38, s. 7 6 & 7 Will. 4, c. 96, s. 6 25 & 26 Vict. c. 103, s. 32 17 Geo. 2, c. 33, s. 4	Any person finding himself aggrieved by any rate or assessment, or has any material objection to any person being put on or left out of such rate or assessment, or by any neglect, act, or thing done or omitted by the churchwardens and overseers, or by any justice.	Next general or quarter sessions for the county, riding, division, corporation, or franchise where such parish lies.
55 Geo. 3, c. 137, s. 9	Any person thinking himself aggrieved by any judgment.	Next general or quarter sess.

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
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Poor Rate—*continued.*

4 & 5 Will. 4, c. 76, s. 103	Any person finding himself aggrieved by any order or conviction where penalty exceeds 5 <i>l.</i> , or order made on such person as the putative father of any bastard child.	Any general or quarter sessions for the county, riding, or division in which such order shall have been made or conviction taken, held within 4 calendar months and not less than 1 month next after cause of complaint shall have arisen.
Poor Law Amendment Act, 1848 (11 & 12 Vict. c. 110, s. 10)	Incorporates the same rights of appeal as under 5 Geo. 4, c. 83.	
Poor Law Amendment Act, 1866 (29 & 30 Vict. c. 113, s. 15)	do. do.	
Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67)		
<i>See METROPOLIS.</i>		

POST Office.

7 Will. 4 & 1 Vict. c. 36, s. 13	Any person finding himself aggrieved by the judgment of any justice.	General or quarter sessions.
Post Office Protection Act, 1884 (47 & 48 Vict. c. 76)	Incorporates provisions of 7 Will. 4 & 1 Vict. c. 36.	

PREVENTION of Crime.

Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112, s. 10)	Any person convicted under this section. By sect. 5 of 39 & 40 Vict. c. 20, such person has same right of appeal as that given by 35 & 36 Vict. c. 94 (Licensing Act, 1872).	Next quarter sessions.
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PROPERTY (Protection of).

38 & 39 Vict. c. 86, s. 12	Any party feeling aggrieved by any conviction.	General or quarter sessions.
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PROVIDENT Societies. *See INDUSTRIAL AND PROVIDENT SOCIETIES.*

PUBLIC Health.

Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 269)	Any person deeming himself aggrieved by any rate made or any order, conviction, judgment or determination or by any matter or thing done.	Next quarter sessions.
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STATUTES ORANTING.	TO WHOM GIVEN.	TO WHAT COURT.
Public Health — <i>continued</i> .		
Public Health Amendment Act, 1890 (53 & 54 Vict. c. 59, s. 7 (1))	Any person aggrieved (a) by any order, judgment, determination or requirement of a local authority; (b) by the withholding of any order, certificate, licence, consent or approval which may be made by a local authority; or (c) by any conviction or order.	Quarter sessions in manner provided by the Summary Jurisdiction Acts.
Public Health (London) Act, 1891 (54 & 55 Vict. c. 76, s. 125) (<i>See also</i> s. 6)	Any person deeming himself aggrieved by any conviction or order.	Quarter sessions.
Private Street Works Act, 1892 (55 & 56 Vict. c. 57, s. 1)	Incorporates the Public Health Act, 1875.	
Public Worship.		
52 Geo. 3, c. 155, s. 16	Any person convicted thinking himself aggrieved.	General or quarter sessions next after conviction.
PUBLISHERS.		
38 & 39 Vict. c. 25, s. 12	Incorporates sect. 110 of the Larceny Act, 1861 (24 & 25 Vict. c. 96). (<i>See</i> LARCENY.)	
RAILWAYS.		
Railways Clauses Act, 1845 (8 & 9 Vict. c. 20, s. 60)	Any party feeling aggrieved.	Quarter sessions of the county or place in which cause of appeal shall have arisen.
Do. do. s. 157	do. do.	General or quarter sessions.
Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50, s. 6)	Any party thinking himself aggrieved by any order or adjudication, or by dismissal of his complaint. [This includes a prosecutor on an acquittal.]	Some court of general or quarter sessions.
Railway Employment (Prevention of Accidents) Act, 1900 (63 & 64 Vict. c. 27, s. 11 (2)) <i>See</i> SUMMARY JURISDICTION ACTS.	Any person convicted under this section may appeal in manner provided by the Summary Jurisdiction Acts.	Next practicable general or quarter sessions.
RECOGNIZANCES (Forfeited).		
3 Geo. 4, c. 46, s. 5..	Any person on whose goods bailiff shall levy.	Next general or quarter sess.
REFRESHMENT Houses Act, 1860.		
23 & 24 Vict. c. 27, s. 34	Party convicted of a second or third offence.	General or quarter sessions then next ensuing.
This section is repealed by 35 & 36 Vict. c. 94, s. 75. so far as it relates to the sale of intoxicating liquors, or any offences connected therewith.		

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
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REGISTRATION.

6 & 7 Will. 4, c. 86, ss. 46, 47	Where sum adjudged to be paid exceeds 5 <i>l.</i> , person convicted.	Next general or quarter sess.
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REMOVAL.

14 Car. 2, c. 12, s. 2
3 W. & M. c. 11, s. 9
35 Geo. 3, c. 101, s. 2
8 & 9 Vict. c. 117
26 & 27 Vict. c. 89,
s. 7

REVENUE (Inland).

Inland Revenue Reg- ulation Act, 1890 (53 & 54 Vict. c. 21, s. 36)	Persons aggrieved	Same power of appeal as under any Act relating to the excise.
Stamp Duties Man- agement Act, 1891 (54 & 55 Vict. c. 38, s. 26)		Like power of appeal as on any fine or penalty under any Act relating to the excise.

RIVERS and Canals.

3 & 4 Vict. c. 50, s. 19	Where penalty adjudged to be paid is more than 3 <i>l.</i> any person thinking himself aggrieved by conviction.	Next general or quarter sess.
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SEEDS (Adulteration of).

Adulteration of Seeds Act, 1869 (32 & 33 Vict. c. 112, s. 6)	Person convicted thinking himself aggrieved.	In England any general or quarter sessions. In Scotland and Ireland in manner provided by law of Scotland and Ireland re- spectively.
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SERVANTS (False Character).

32 Geo. 3, c. 56, s. 10	Any person thinking himself aggrieved by anything done in pursuance of this Act.	Next general or quarter sess.
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SHIPPING (Ports, Harbours, &c.).

54 Geo. 3, c. 159, s. 26	Person convicted	General quarter sessions within 3 calendar months next after conviction.
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Shipping (Merchant). *See* MERCHANT SHIPPING.

SLAUGHTER Houses.

7 & 8 Vict. c. 87, s. 9	Person thinking himself ag- grieved.	Next general or quarter sess.
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STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
STAGE Carriages.		
2 & 3 Will. 4, c. 120, s. 103	The person convicted finding himself aggrieved by the judgment of any justice.	General or quarter sessions.
STAMPS. See REVENUE (INLAND).		
SUMMARY Jurisdiction Acts.		
Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49, s. 19)	Any person adjudged by conviction or order of court of summary jurisdiction to be imprisoned without option of fine. [As to "order," see sect. 19.]	Next practicable court of general or quarter sessions.
TELEGRAPH.		
Telegraph Act, 1863 (26 & 27 Vict. c. 112, s. 4)	Incorporates the Railways Clauses Consolidation Act, 1845.	
Telegraph Act, 1868 (31 & 32 Vict. c. 110)	Incorporates the Telegraph Act, 1863.	
Telegraph Act, 1869 (32 & 33 Vict. c. 73)	do. do.	
Telegraph (Submarine) Act, 1885 (48 & 49 Vict. c. 49, s. 7)	Part X. of Merchant Shipping Act, 1854, is incorporated. That Act is repealed by 57 & 58 Vict. c. 60, and s. 682 substituted therefor. By that section an appeal is given to any person convicted where the person convicted and fine inflicted or sum ordered to be paid exceeds 5 <i>l</i> .	Quarter sessions in manner provided by the Summary Jurisdiction Acts.
Public Health Amendment Act, 1890 (53 & 54 Vict. c. 59, s. 7)	Any person aggrieved (a) by any order, judgment, determination, or requirement of a local authority; (b) by the withholding of any order, certificate, licence, consent, or approval which may be made by a local authority; or (c) by any conviction or order.	do. do.
THAMES.		
Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii. s. 211) (a)	The conservators or any other body corporate or any person deeming themselves aggrieved by any order, conviction, judgment, or determination.	Quarter sessions.
THEATRES.		
Theatres Act, 1843 (6 & 7 Vict. c. 68, s. 20)	Person thinking himself aggrieved.	Next general or quarter sess.
	(a) Local Act.	

STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
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TOWNS (Improvement of).

Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34, s. 210)	Incorporates the clauses of the Railways Clauses Con- solidation Act, 1845 (8 & 9 Vict. c. 20), relating to appeals.
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TRADE Unions.

Trade Union Act, 1871 (34 & 35 Vict. c. 31, s. 20)	Any party feeling aggrieved.	General or quarter sessions.
Trade Union Amend- ment Act, 1876 (39 & 40 Vict. c. 22, s. 2)	Incorporates last-named Act.	

TURNPIKES.

4 Geo. 4, c. 95, s. 87	Any person thinking himself aggrieved by any judgment or determination.	Next general or quarter sess.
7 & 8 Geo. 4, c. 24, s. 20	Incorporates provisions of 4 Geo. 4, c. 95.	

UNION. *See* WORKHOUSE.

VAGRANCY Act, 1824.

5 Geo. 4, c. 83, s. 14	Any person aggrieved by any act or determination of any justice.	Next general or quarter ses- sions for the county, riding, or place in and for which such justice shall have acted.
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Vagrant Act Amend- ment Act, 1873 (36 & 37 Vict. c. 38)	Incorporated with last-named Act.
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VOLUNTEERS.

Volunteer Act, 1863 (26 & 27 Vict. c. 65, s. 48)	Where sum adjudged to be paid exceeds 5 <i>l.</i> , or impris- onment awarded exceeds 1 month, person convicted, or against whom an adju- dication is made, thinking himself aggrieved.	Next general or quarter sess.
Volunteer Act, 1869 (32 & 33 Vict. c. 81, s. 2)	Incorporates above Act.	

WATERWORKS.

Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17, s. 85)	As to England and Ireland, incorporates the clauses of the Railways Clauses Con- solidation Act, 1845, as to appeals. As to Scotland, incorporates the clauses of the Railways Clauses Consolidation Act [Scotland], 1845, as to ap- peals.
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STATUTES GRANTING.	TO WHOM GIVEN.	TO WHAT COURT.
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Waterworks—*continued.*

Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93, s. 2)	Incorporates the provisions of the Waterworks Clauses Act, 1847, as to appeals.	
Do. do. s. 9	Undertakers considering themselves aggrieved by any order or determination of justices.	Quarter sessions for the county or place where the cause of appeal arises, subject to like conditions as by the Railways Clauses Consolidation Act, 1845, provided.

WEIGHTS and Measures.

Weights & Measures Act, 1878 (41 & 42 Vict. c. 49, s. 60)	Any person feeling himself aggrieved.	Next practicable court of general quarter sessions.
Weights & Measures Act, 1889 (52 & 53 Vict. c. 21, s. 34)	Incorporates last-named Act.	

WORKHOUSE.

55 Geo. 3, c. 137, s. 9	Person thinking himself ag- grieved by judgment of justices.	Next general or quarter sess.
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WORKMEN (Frauds by). *See FRAUD.***WORKSHOPS.** *See FACTORIES.***YOUTHFUL Offenders.**

Youthful Offenders Act, 1901 (1 Edw. 7, c. 20, s. 2 (6))	Parent or guardian ordered to pay fine, &c., under s. 2 (4).	Quarter sessions.
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APPENDIX A.

LIST OF OFFENCES TRIABLE AT QUARTER SESSIONS.

As to Punishments.

Transportation.—By sect. 2 of the Penal Servitude Act, 1857 (20 & 21 Vict. c. 3), no person shall be sentenced to transportation; and any person who if that Act had not been passed might have been sentenced to transportation shall be liable to be kept in penal servitude.

Penal Servitude.—By sect. 1 of the Penal Servitude Act, 1891 (54 & 55 Vict. c. 69): (1) Where under any enactment in force when this section comes into operation (5th August, 1891) a Court has power to award a sentence of penal servitude, the sentence may, at the discretion of the Court, be for any period not less than three years, and not exceeding either five years, or any greater period authorized by the enactment.

Imprisonment.—And by sect. 1 (2) of the same Act, where under any Act now in force, or under any future Act, a Court is empowered or required to award a sentence of penal servitude, the Court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years, with or without hard labour.

Recognizances.—Power is given in many statutes to bind over convicted persons on their own recognizances and with sureties, and in particular any person convicted of any felony under the Larceny Act, 1861 (24 & 25 Vict. c. 96, s. 117); Malicious Injuries Act, 1861 (24 & 25 Vict. c. 97, s. 73); Forgery Act, 1861 (24 & 25 Vict. c. 98, s. 51); Coinage Offences Act, 1861 (24 & 25 Vict. c. 99, s. 38); and Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100, s. 71), may be required to enter into his own recognizances and to find sureties, both or either, for keeping the peace in addition to any of the punishments in the Acts authorized, provided that no person shall be imprisoned for not finding sureties for any period exceeding one year.

The following abbreviations are used in the annexed list to economise space:—

yrs. = years.

mos. = months.

p. s. = penal servitude.

impt. = imprisonment.

w. = with. wt. = without.

h. l. = hard labour.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
ABORTION.		
Supplying noxious thing or instrument to be used to procure miscarriage.	Misdemeanour 24 & 25 Vict. c. 100, s. 59	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
ADULTERATION.		
Mixing food or drug with ingredient injurious to health.	Misdemeanour 38 & 39 Vict. c. 63, ss. 3, 4	After one conviction, 6 mos. impt. w. h. l.
Forging any certificate or writing purporting to contain a warrant.	Misdemeanour <i>Id.</i> s. 27.	2 yrs. impt. w. h. l.
AFFRAY.		
To make an affray	Misdemeanour at common law.	Fine or impt. wt. h. l. or both.
ANIMALS.		
Stealing horse, mare, bull, cow, sheep, &c.	Felony 24 & 25 Vict. c. 96, s. 10.	14 yrs. or 2 yrs. impt. w. or wt. h. l.
Killing any animal with intent to steal carcass, skin, &c.	Felony <i>Id.</i> s. 11.	Same punishment as if convicted of stealing animal, if stealing animal would have amounted to felony.
Stealing dog after previous conviction for same offence.	Misdemeanour <i>Id.</i> s. 18.	18 mos. impt. w. or wt. h. l.
Having in possession, or on premises, stolen dog or skin of stolen dog, having been convicted of any such offence.	Misdemeanour <i>Id.</i> s. 19.	do. do.
Taking money or reward under pretence of aiding person to recover stolen dog.	Misdemeanour <i>Id.</i> s. 20.	do. do.
Stealing, or killing with intent to steal, any bird, beast, animal, &c., ordinarily kept in confinement, not being subject of larceny at common law.	Misdemeanour <i>Id.</i> s. 21.	6 mos. impt. w. or wt. h. l.
The like offence after having been convicted of any such offence.	Misdemeanour <i>Id.</i> s. 21.	12 mos. impt. w. or wt. h. l.
Killing or maiming cattle	Felony 24 & 25 Vict. c. 97, s. 40	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Killing or maiming animals other than cattle.	Misdemeanour <i>Id.</i> s. 41, and 42 & 43 Vict. c. 49, s. 17.	6 mos. impt. w. or wt. h. l. and fine not exceeding 20 <i>l.</i> After previous conviction. 12 mos. impt. w. or wt. h. l.
ARSON.		
Attempting to set fire to mine, to set fire to which would be felony.	Felony 24 & 25 Vict. c. 97, s. 27	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.; male under 16 whipping.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
Arson — <i>continued</i> .		
Attempting to set fire to, destroy or cast away ship, to set fire to which, destroy or cast away would be felony.	Felony 24 & 25 Vict. c. 97, s. 44.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Setting fire to crops of hay or grass, or any cultivated vegetable produce, other than corn, grain or pulse.	Felony <i>Id.</i> s. 16.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whipping.
Attempting the like, where, if set fire to, it would be felony.	Felony <i>Id.</i> s. 18.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whipping.
Setting fire to any building other than in that Act before mentioned.	Felony <i>Id.</i> s. 1.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whipping.
Setting fire to anything in, against, or under any building, to set fire to which building would amount to felony.	Felony <i>Id.</i> s. 7.	do. do.
Attempting to set fire to any building, &c., to set fire to which would amount to felony.	Felony <i>Id.</i> s. 8.	do. do.
ASSAULT.		
Poacher assaulting a person authorized to arrest him.	Misdemeanour 9 Geo. 4, c. 69, s. 2.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Any person committing an indictable offence in the night assaulting any person authorized to apprehend him.	Misdemeanour 14 & 15 Vict. c. 19, s. 12.	3 yrs. impt. w. or wt. h. l.
On officer of workhouse or relieving officer.	Misdemeanour 13 & 14 Vict. c. 101, s. 9.	2 yrs. impt. w. or wt. h. l.
Master of ship forcing on shore and leaving behind seaman.	Misdemeanour 57 & 58 Vict. c. 60, s. 187.	Fine or impt. w. or wt. h. l., or both.
Assaulting person having care of deer.	Felony 24 & 25 Vict. c. 96, s. 16.	2 yrs. impt. w. or wt. h. l. ; male under 16 whipping.
Unlawfully wounding or inflicting grievous bodily harm.	Misdemeanour 24 & 25 Vict. c. 100, s. 20.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Administering poison so as to endanger life or inflict grievous bodily harm.	Felony <i>Id.</i> s. 23.	10 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Administering poison with intent to injure.	Misdemeanour <i>Id.</i> s. 24.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Assaulting or neglecting to supply apprentice with food.	Misdemeanour <i>Id.</i> s. 26.	do. do.
Assaulting officer, &c., while in exercise of his duty saving wreck.	Misdemeanour <i>Id.</i> s. 37.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
Assault—continued.		
Assaulting peace officer in execution of duty.	Misdemeanour 24 & 25 Vict. c. 100, s. 38.	2 yrs. impt. w. or wt. h. l.
With intent to commit a felony.	Misdemeanour <i>Id.</i> s. 38.	do. do.
With intent to rob	Felony 24 & 25 Vict. c. 96, s. 42.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Common assault	Misdemeanour 24 & 25 Vict. c. 100, s. 47.	12 mos. impt. w. or wt. h. l.
Causing actual bodily harm ..	Misdemeanour <i>Id.</i> s. 47.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
BALLOT Act.		
Offences against	Misdemeanour 35 & 36 Vict. c. 33, s. 3.	If returning officer or clerk, 2 yrs. impt. w. or wt. h. l.; any other person 6 mos. w. or wt. h. l.
BANKRUPTCY.		
Not discovering estate to trustee.	Misdemeanour 32 & 33 Vict. c. 62, s. 11; 46 & 47 Vict. c. 52, s. 163; and 53 & 54 Vict. c. 71, s. 26.	2 yrs. impt. w. or wt. h. l.
Non-delivery of estate to trustee.	Misdemeanour <i>Id.</i>	The like.
Non-delivery of books, &c.....	Misdemeanour <i>Id.</i>	do.
Concealing property	Misdemeanour <i>Id.</i>	do.
Fraudulently removing property.	Misdemeanour <i>Id.</i>	do.
Material omissions in statement of affairs.	Misdemeanour <i>Id.</i>	do.
Failing to inform trustee of false claim.	Misdemeanour <i>Id.</i>	do.
Preventing production of books.	Misdemeanour <i>Id.</i>	do.
Destruction or concealment of books.	Misdemeanour <i>Id.</i>	do.
Making false entries in books..	Misdemeanour <i>Id.</i>	do.
Fraudulently altering documents.	Misdemeanour <i>Id.</i>	do.
Fictitious accounts of losses ..	Misdemeanour <i>Id.</i>	do.
Obtaining property on credit by fraud.	Misdemeanour <i>Id.</i>	do.
Traders obtaining goods by fraud.	Misdemeanour <i>Id.</i>	do.
Disposing of goods otherwise than in course of trade.	Misdemeanour <i>Id.</i>	do.
Obtaining consent of creditors to agreement by false representations.	Misdemeanour <i>Id.</i>	do.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
Bankruptcy—continued.		
Absconding, or preparing or attempting to abscond, with property-value of 20 <i>l</i> .	Felony 32 & 33 Vict. c. 62, s. 12.	2 yrs. impt. w. or wt. h. l.
Creditor making false claims ..	Misdemeanour <i>Id.</i> s. 14.	1 yrs. impt. w. or wt. h. l.
Undischarged bankrupt obtaining credit.	Misdemeanour 46 & 47 Vict. c. 52, s. 31.	2 yrs. impt. w. or wt. h. l.
BILLETING.		
Unlawful	Misdemeanour 44 & 45 Vict. c. 58, s. 111.	2 yrs. impt. w. or wt. h. l., or fine, or both.
BRIDGES.		
Non-repair of	Misdemeanour at common law & 22 Hen. 8. c. 5, s. 1.	Fine.
BURGLARY and Housebreaking.		
Breaking out of house by night after stealing.	Felony 24 & 25 Vict. c. 96, s. 51, and 55 & 56 Vict. c. 57, s. 1.	P. s. for life, or 2 yrs. impt. w. or wt. h. l.
Burglary	Felony <i>Id.</i> s. 52, and <i>id.</i> s. 1.	do do.
Entering a house at night to commit a felony.	Felony 24 & 25 Vict. c. 96, s. 54.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Entering building to commit felony, such building being within curtilage of dwelling-house, or being in building committing felony and breaking out.	Felony <i>Id.</i> s. 55.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Breaking and entering dwelling-house, shop, &c., and committing felony therein, or being in commit felony and break out.	Felony <i>Id.</i> s. 56.	do do.
Breaking and entering dwelling-house, &c., with intent to commit felony.	Felony <i>Id.</i> s. 57.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Being found by night armed, with intent to break into a building and commit a felony, or having an implement of housebreaking without lawful excuse, or having the face blackened or being in a building, with intent to commit felony.	Misdemeanour <i>Id.</i> s. 58.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
The like, after a previous conviction.	Misdemeanour <i>Id.</i> s. 59.	10 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
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CHALLENGE.

Challenging to fight a duel ..	Misdemeanour at common law.	Fine or impt. wt. h. l., or both.
Provoking man to send a challenge.	do. do.	do. do.

CHEATING.

At play	Misdemeanour 8 & 9 Vict. c. 109, s. 17.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
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CHILDREN.

Enticing away, &c. child under age of 14 years.	Felony 24 & 25 Vict. c. 100, s. 56.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.; male under 16 whipping.
Abandoning or exposing child under age of 2 years.	Misdemeanour <i>Id.</i> s. 27.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Where, in a public exhibition dangerous to child taking part therein, under sect. 1 of 42 & 43 Vict. c. 34, an accident occurs to the child, the employer may be indicted as having committed an assault.	Misdemeanour 42 & 43 Vict. c. 34, s. 3.	1 yrs. impt. w. or wt. h. l.
Assaulting, neglecting, &c. child under age of 16.	Misdemeanour 57 & 58 Vict. c. 41, s. 1.	Fine not exceeding 100l. or 2 yrs. impt. w. or wt. h. l., or both.

If person interested in money payable on death of child, fine may be increased to 200l. or 5 yrs. p. s.

COINING.

Lightening coin	Felony 24 & 25 Vict. c. 99, s. 4.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Being in possession of filings or clippings produced by lightening, &c., coins.	Felony <i>Id.</i> s. 5.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Exporting counterfeit coin	Misdemeanour <i>Id.</i> s. 8.	2 yrs. impt. w. or wt. h. l.
Uttering counterfeit gold or silver coin.	Misdemeanour <i>Id.</i> s. 9.	1 yrs. impt. w. or wt. h. l.; and on second conv., police super- vision under 34 & 35 Vict. c. 112, ss. 8, 20.
Uttering, having in possession other counterfeit coin, or within ten days after again uttering counterfeit coin.	Misdemeanour <i>Id.</i> s. 10.	2 yrs. impt. w. or wt. h. l.
Possessing three or more counterfeit coins with intent to utter.	Misdemeanour <i>Id.</i> s. 11.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.; on second conviction, as above.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
Coining—continued.		
Uttering as current coin any foreign coin or medal.	Misdemeanour 24 & 25 Vict. c. 99, s. 13	1 yrs. impt. w. or wt. h. l.
Making, or possessing tools for making, counterfeit copper coin.	Felony <i>Id.</i> s. 14.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Uttering counterfeit copper coin, or possessing 3 coins with intent to utter.	Misdemeanour <i>Id.</i> s. 15.	1 yrs. impt. w. or wt. h. l.
Counterfeiting foreign gold or silver coin.	Felony <i>Id.</i> s. 18.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Importing foreign counterfeit gold or silver coin.	Felony <i>Id.</i> s. 19.	do. do.
Uttering such coin	Misdemeanour <i>Id.</i> s. 20.	6 mos. impt. w. or wt. h. l.
The like after previous conviction.	Misdemeanour <i>Id.</i> s. 21.	2 yrs. impt. w. or wt. h. l.
The like after second conviction	Felony <i>Id.</i> s. 21.	P. s. for life, or 2 yrs. impt. w. or wt. h. l.
Defacing coins	Misdemeanour <i>Id.</i> s. 16.	1 yrs. impt. w. or wt. h. l.
Counterfeiting foreign coin of less value than silver.	Misdemeanour <i>Id.</i> s. 22.	1 yrs. impt. w. or wt. h. l. ; second offence, 7 yrs. p. s.
Principal in second degree, and every accessory before the fact.	Felony <i>Id.</i> s. 35.	Punishable as principal.
Accessory after fact to any felony punishable under Act.	Felony <i>Id.</i> s. 35.	2 yrs. impt. w. or wt. h. l.
Making or selling medals resembling coins.	Misdemeanour 46 & 47 Vict. c. 45, s. 2.	1 yrs. impt. w. or wt. h. l.

COMMISSIONS in Army.

Trafficking in	Misdemeanour 44 & 45 Vict. c. 58, s. 155.	6 mos. impt. w. or wt. h. l. or 100 <i>l.</i> fine.
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COMPANY.

Director or contributor of company being wound up falsifying books.	Misdemeanour 25 & 26 Vict. c. 89, s. 166.	2 yrs. impt. w. or wt. h. l.
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COMPOUNDING Felony, &c.

Corruptly taking reward for restoring stolen property.	Felony 24 & 25 Vict. c. 96, s. 101.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 18 whipping.
Compounding felony	Misdemeanour at common law.	Fine and impt. wt. h. l.
Compounding information on penal statute without leave of court.	Misdemeanour 18 Eliz. c. 5, s. 4.	Fine or impt. wt. h. l., or both.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
CONSPIRACY.		
To commit an offence which, when committed by one person, quarter sessions have jurisdiction to try.	Misdemeanour at common law. 5 & 6 Vict. c. 38, s. 1.	Fine or impt., or both.
To break contract of service for supply of gas or water.	Misdemeanour 38 & 39 Vict. c. 86, s. 4.	Fine 20 <i>l.</i> or 3 mos. impt. w. or wt. h. 1.
To break contract of service involving serious injury to person or property.	Misdemeanour <i>Id.</i> s. 5.	do. do.
Intimidation ("Picketing") ..	Misdemeanour <i>Id.</i> s. 7.	do. do.
CONSTABLE.		
Refusing to assist when called upon.	Misdemeanour at common law.	Fine or impt., or both.
Obtaining pension by fraud on police fund.	Misdemeanour 53 & 54 Vict. c. 45.	2 yrs. impt. w. or wt. h. 1.
COPYRIGHT.		
Wilfully making false entry, &c., at Stationers' Hall.	Misdemeanour 5 & 6 Vict. c. 45, s. 12.	Fine or impt., or both.
CORN Returns.		
Making false	Misdemeanour 45 & 46 Vict. c. 37, s. 12.	do. do.
CORRUPT Practices.		
Bribery of or by members and servants of public bodies.	Misdemeanour 52 & 53 Vict. c. 69, s. 1.	2 yrs. impt. w. or wt. h. 1., or fine of 500 <i>l.</i> , or both, to refund bribe and to be ad- judged incapable of holding office for varying terms.
CRUELTY to Animals.		
Any person accused of an offence against Act for which penalty of more than 5 <i>l.</i> can be imposed.	Misdemeanour 39 & 40 Vict. c. 77, ss. 2, 6, 15.	First offence 50 <i>l.</i> fine; subsequent offence 100 <i>l.</i> or 3 mos. impt.
DEAD Bodies.		
Offences as to	Misdemeanour at common law.	Fine or impt. wt. h. 1., or both.
DEBTOR.		
Fraudulently obtaining credit..	Misdemeanour 32 & 33 Vict. c. 62, s. 13.	1 yrs. impt. w. or wt. h. 1.
Concealing property with intent to defraud creditors.	Misdemeanour <i>Id.</i>	do. do.
Making gift, &c., with intent to defraud creditors.	Misdemeanour <i>Id.</i>	do. do.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
DENTISTS.		
Offence by registrar	Misdemeanour 41 & 42 Vict. c. 33, s. 34.	12 mos. impt. w. or wt. h. l.
DISOBEDIENCE.		
To statutes.....	Misdemeanour at com- mon law.	Fine or impt., or both.
DISORDERLY House.		
Keeping	Misdemeanour at com- mon law.	Impt. w. or wt. h. l. or fine, or both.
DRIVING.		
By furious driving cause bodily harm.	Misdemeanour 24 & 25 Vict. c. 100, s. 35.	2 yrs. impt. w. or wt. h. l.
ELECTRICITY.		
Injuring works with intent to cut off supply.	Felony 45 & 46 Vict. c. 56, s. 22.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Stealing	Felony <i>Id.</i>	do. do.
EMBEZZLEMENT.		
By partner or joint owner	Felony 31 & 32 Vict. c. 116, s. 1.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
By public servants	Felony 24 & 25 Vict. c. 96, s. 70.	do. do.
By clerk or servant	Felony <i>Id.</i> s. 68.	14 yrs. p. s. or impt. for 2 yrs. w. or wt. h. l.; male under 16 whipping.
ESCAPE.		
Escaping from lawful custody, whether innocent or guilty.	Misdemeanour at com- mon law.	Fine or impt. w. or wt. h. l.
Aiding prisoner to escape	Felony 28 & 29 Vict. c. 126, s. 37.	2 yrs. impt. w. or wt. h. l.
Constable negligently permit- ting an escape.	Misdemeanour at com- mon law.	Fine or impt., or both.
Breaking prison	Felony at common law..	If defendant in custody for treason or felony, 7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.; if for any other of- fence, fine and impt.
Rescuing prisoner not convicted of offence for which in cus- tody.	Misdemeanour at com- mon law.	Fine and impt. w. or wt. h. l.
The like where prisoner con- victed of felony.	Felony at common law..	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
The like where prisoner con- victed of misdemeanour.	Misdemeanour at com- mon law.	Fine or impt. w. or wt. h. l.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
EXTORTION.		
By constable	Misdemeanour at common law.	Fine or impt. w. or wt. h. l., or both.
FALSE		
Imprisonment	Misdemeanour at common law.	Fine or impt. wt. h. l., or both.
False Pretences.		
Obtaining chattels, &c., by ..	Misdemeanour 24 & 25 Vict. c. 96, s. 88.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Obtaining chattels to be delivered to another person by.	Misdemeanour <i>Id.</i> s. 89.	do. do.
Inducing persons by fraud to execute deeds, &c.	Misdemeanour <i>Id.</i> s. 90.	do. do.
Obtaining property by.....	Misdemeanour at common law.	Fine or impt. w. or wt. h. l.
Obtaining credit by	Misdemeanour 32 & 33 Vict. c. 62, s. 13.	1 yrs. impt. w. or wt. h. l.
FALSIFICATION of Accounts.		
By clerk, officer or servant....	Misdemeanour 38 & 39 Vict. c. 24, s. 1.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
FELONY.		
Misprision of	Misdemeanour at common law.	Fine or impt., or both.
FORCIBLE		
Entry and Detainer	do. do.	Impt. wt. h. l. or fine, at the discretion of the court, or both.
FOREIGN Enlistment Act.		
Offences against	Misdemeanour 33 & 34 Vict. c. 90, ss. 4-8, 10-12.	2 yrs. impt. w. or wt. h. l. or fine, or both.
FORGERY.		
Accessory after fact to felonious forgery.	Misdemeanour 24 & 25 Vict. c. 98, s. 49.	2 yrs. impt. w. or wt. h. l.
HIGHWAYS.		
Obstructing	Misdemeanour at common law.	Fine or impt., or both.
Non-repair of	do. do.	Fine.
INCITEMENT.		
To commit crime	do. do.	Fine or impt. wt. h. l., or both.
INDECENCY.		
Exposure in public	do. do.	Impt. w. or wt. h. l. or fine, or both.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
INDECENT Assault.		
Indecently assaulting female ..	Misdemeanour 24 & 25 Vict. c. 100, s. 52.	2 yrs. impt. w. or wt. h. l.
Indecently assaulting male....	Misdemeanour <i>Id.</i> s. 62.	10 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Committing or procuring, or attempting to commit, act of gross indecency with male person.	Misdemeanour 48 & 49 Vict. c. 69, s. 11.	2 yrs. impt.
INFANTS.		
Sending letter to, inviting to bet.	Misdemeanour 55 & 56 Vict. c. 4, s. 1.	3 mos. impt. w. or wt. h. l. or 100 <i>l.</i> fine, or both.
Sending circular to, inviting to borrow money.	Misdemeanour <i>Id.</i> s. 2.	do. do.
INLAND Revenue.		
Officer of, concerned in any business subject to law of excise.	Misdemeanour 53 & 54 Vict. c. 21, s. 7.	Fine or 2 yrs. impt. w. or wt. h. l., or both, and incapable holding office.
Collector omitting to keep ac- counts.	Misdemeanour <i>Id.</i> s. 14.	do. do.
LAND Transfer.		
Fraudulent entry or erasure in register.	Misdemeanour 38 & 39 Vict. c. 87, s. 99.	2 yrs. impt. w. or wt. h. l. or fine not ex- ceeding 500 <i>l.</i>
Concealing document.	Misdemeanour <i>Id.</i> s. 99.	do. do.
LARCENY.		
By bailee	Felony 24 & 25 Vict. c. 96, s. 3.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.; male under 16 whip- ping.
Simple	Felony at common law .. <i>Id.</i> s. 4.	do. do.
Simple, after previous convic- tion.	Felony <i>Id.</i> s. 7.	10 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.; male under 16 whip- ping.
Simple, after conviction of in- dictable misdemeanour under 24 & 25 Vict. c. 96.	Felony <i>Id.</i> s. 8.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.; male under 16 whip- ping.
Larceny after two summary convictions.	Felony <i>Id.</i> s. 9.	do. do.
Stealing horse, mare, bull, cow, sheep, &c.	Felony <i>Id.</i> s. 10.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
Larceny—continued.		
Killing any animal with intent to steal carcase, skin, &c.	Felony 24 & 25 Vict. c. 96, s. 11.	Same punishment as if convicted of stealing animal, if stealing animal would have amounted to felony.
Hunting, killing, or wounding deer kept or being in uninclosed forest, after previous conviction relating to deer.	Felony <i>Id.</i> s. 12.	2 yrs. impt. w. or wt. h. l. ; male under 16 whipping.
Hunting, killing, or wounding deer kept in inclosed forest.	Felony <i>Id.</i> s. 13.	do. do.
Taking or killing hares or rabbits at night time.	Misdemeanour <i>Id.</i> s. 17.	
Stealing dogs after previous conviction for same offence.	Misdemeanour <i>Id.</i> s. 18.	18 mos. impt. w. or wt. h. l.
Having in possession, or on premises, stolen dog or skin of stolen dog, having been convicted of any such offence.	Misdemeanour <i>Id.</i> s. 19.	do. do.
Taking money or reward under pretence of aiding person to recover stolen dog.	Misdemeanour <i>Id.</i> s. 20.	do. do.
Stealing, or killing with intent to steal, any bird, beast, animal, &c., ordinarily kept in confinement, not being subject of larceny at common law.	Misdemeanour <i>Id.</i> s. 21.	6 mos. impt. w. or wt. h. l.
The like offence after having been convicted of any such offence.	Misdemeanour <i>Id.</i> s. 21.	12 mos. impt. w. or wt. h. l.
Taking fish in water adjoining owner's dwelling-house.	Misdemeanour <i>Id.</i> s. 24.	Fine or impt., or both.
Stealing oysters	Felony <i>Id.</i> s. 26.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whipping.
Dredging for oysters	Misdemeanour <i>Id.</i> s. 26.	3 mos. impt. w. or wt. h. l.
Stealing valuable security other than document of title.	Felony <i>Id.</i> s. 27.	do. do.
Stealing, &c., glass or woodwork, lead, iron, or copper fixed to building.	Felony <i>Id.</i> s. 31.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whipping.
Stealing, cutting, &c., trees in cultivated, &c., ground (if value of articles exceed 1 <i>l.</i>).	Felony <i>Id.</i> s. 32.	do. do.
The like if trees grow elsewhere than as above (if value exceed 5 <i>l.</i>).	Felony <i>Id.</i> s. 32.	do. do.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
Larceny—continued.		
The like wherever tree is growing (if value of article 1 <i>s.</i>), after two previous convictions.	Felony 24 & 25 Vict. c. 96, s. 33.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whipping.
Stealing plants, fruits, &c., in garden, after one previous conviction.	Felony <i>Id.</i> s. 36.	do. do.
Stealing ore from mine	Felony <i>Id.</i> s. 38.	2 yrs. impt. w. or wt. h. l.
Being employed at mine, stealing ore.	Felony <i>Id.</i> s. 39.	2 yrs. impt. w. or wt. h. l.
From the person	Felony <i>Id.</i> s. 40.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
With menaces and threats	Felony <i>Id.</i> s. 45.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Stealing in dwelling-house to the value of 5 <i>l.</i>	Felony <i>Id.</i> s. 60.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Stealing in dwelling-house with threats.	Felony <i>Id.</i> s. 61.	do. do.
Stealing silk, &c., in process of manufacture.	Felony <i>Id.</i> s. 62.	14 yrs. p. s.
Stealing from ship in port or goods from dock.	Felony <i>Id.</i> s. 63.	do.
Stealing part of or goods from wreck.	Felony <i>Id.</i> s. 64.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Stealing by clerk or servant ..	Felony <i>Id.</i> s. 67.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whipping.
Stealing by person in public service or constable, &c.	Felony <i>Id.</i> s. 69.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Stealing of fixture or chattel by tenant or lodger.	Felony <i>Id.</i> s. 74.	2 yrs. impt. w. or wt. h. l.
The like if article exceed 5 <i>l.</i> in value.	Felony <i>Id.</i> s. 74.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whipping.
Receiving stolen goods where theft a felony.	Felony <i>Id.</i> s. 91.	14 yrs. p. s. or 2 yrs. impt. ; male under 16 whipping.
Receiving stolen goods where theft a misdemeanour.	Misdemeanour <i>Id.</i> s. 95.	7 yrs. p. s. or 2 yrs. impt. ; male under 16 whipping.
Receiving or having in possession any property stolen outside the United Kingdom.	Felony 59 & 60 Vict. c. 52, s. 1.	P. s. 7—3 yrs. or impt. 2 yrs. w. or wt. h. l.
Of electricity	Felony 15 & 46 Vict. c. 56, s. 23.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
By member of partnership	Felony 31 & 32 Vict. c. 116, s. 1.	As if not a member.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
LETTERS.		
Sending letter threatening to kill.	Felony 24 & 25 Vict. c. 100, s. 16.	10 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.; male under 16 whip- ping.
Sending letter threatening to burn.	Felony <i>Id.</i> s. 50.	do. d.
Sending indecent letter	Misdemeanour 47 & 48 Vict. c. 76, s. 4.	1 yrs. impt. w. or wt. h. l.
LUNACY.		
Illegally presenting second petition.	Misdemeanour 53 & 54 Vict. c. 5, s. 7 (4).	Fine or impt., or both.
Using mechanical means of restraint contrary to section.	Misdemeanour <i>Id.</i> s. 40.	do. do.
Omitting to forward copy of commissioners' minute.	Misdemeanour <i>Id.</i> s. 197.	do. do.
Wilfully supplying false information to obtain licence.	Misdemeanour <i>Id.</i> s. 214.	do. do.
Detaining lunatics after revocation of licence.	Misdemeanour <i>Id.</i> s. 222.	do. do.
Superintendent detaining lunatics illegally.	Misdemeanour <i>Id.</i> s. 231 (10).	do. do.
Same detaining lunatic in building not shown on plan.	Misdemeanour <i>Id.</i> s. 233 (2).	do. do.
Detaining lunatic after date for closing of hospital.	Misdemeanour <i>Id.</i> s. 237 (4).	do. do.
Detaining lunatic in unlicensed house.	Misdemeanour <i>Id.</i> s. 315 (1).	do. do.
Neglecting to send notices on admission.	Misdemeanour <i>Id.</i> s. 316.	do. do.
Making wilful misstatements in petition or medical certificate.	Misdemeanour <i>Id.</i> s. 317.	do. do.
Making false entries in book ..	Misdemeanour <i>Id.</i> s. 318.	do. do.
Not notifying coroner of death of lunatic.	Misdemeanour <i>Id.</i> s. 319.	do. do.
Obstructing commissioner	Misdemeanour <i>Id.</i> s. 321.	do. do.
Officer, &c., illtreating or neglecting lunatic.	Misdemeanour <i>Id.</i> s. 322.	do. do.
Officer, &c., carnally knowing or attempting to have carnal knowledge of female lunatic.	Misdemeanour <i>Id.</i> s. 324.	2 yrs. impt. w. or wt. h. l.
MAINTENANCE	Misdemeanour at com- mon law.	Fine or impt., or both.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
MALICIOUS Injury.		
Putting explosives in or near, &c., buildings, &c., with intent to destroy same.	Felony 24 & 25 Vict. c. 97, s. 9.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whip- ping.
Damaging buildings by tenants.	Misdemeanour <i>Id.</i> s. 13.	Fine or impt., or both.
Damaging any machine used for sowing, ploughing, &c., or in manufactures.	Felony <i>Id.</i> s. 15.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whip- ping.
Destroying hopbinds	Felony <i>Id.</i> s. 19.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whip- ping.
Destroying trees, &c., in park, &c., injury exceeding 1 <i>l.</i>	Felony <i>Id.</i> s. 20.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whip- ping.
Destroying trees, &c., not in park, &c., injury exceeding 5 <i>l.</i>	Felony <i>Id.</i> s. 21.	do. do.
The like after two previous convictions, injury amounting to 1 <i>s.</i>	Misdemeanour <i>Id.</i> s. 22.	2 yrs. impt. w. or wt. h. l. ; male under 16 whipping.
Destroying plants, &c., in garden, &c., after one summary conviction.	Felony <i>Id.</i> s. 23.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whip- ping.
Letting water into mine, or obstructing air passage.	Felony <i>Id.</i> s. 28.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whip- ping.
Damaging machinery in mines.	Felony <i>Id.</i> s. 29.	do. do.
Injuring materials for securing sea or river bank.	Felony <i>Id.</i> s. 31.	do. do.
Injuring fish pond	Misdemeanour <i>Id.</i> s. 32.	do. do.
Damaging toll bars	Misdemeanour <i>Id.</i> s. 34.	Fine or impt., or both.
Destroying telegraph posts, &c.	Misdemeanour <i>Id.</i> s. 37.	2 yrs. impt. w. or wt. h. l.
Destroying works of art, &c...	Misdemeanour <i>Id.</i> s. 39.	6 mos. impt. w. or wt. h. l. ; male under 16 whipping.
Throwing explosive into ship with intent to injure same ..	Felony <i>Id.</i> s. 45.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l. ; male under 16 whip- ping.
Damaging ships otherwise than with explosive.	Felony <i>Id.</i> s. 46.	do. do.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
Malicious Injury—continued.		
Cutting away, &c., buoys	Felony 24 & 25 Vict. c. 97, s. 48.	7 yrs. p. s. or 2 yrs. impt. ; male under 16 whipping.
Destroying any part of, or goods from, any wrecked ship	Felony <i>Id.</i> s. 49.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Injuring property — damage exceeding 5 <i>l.</i>	Misdemeanour <i>Id.</i> s. 51.	2 yrs. impt. w. or wt. h. l.
The like, committed between 9 p.m. and 6 a.m.	Misdemeanour <i>Id.</i> s. 51.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Making or having in possession explosives, &c., with intent to commit or enabling any person to commit any felony under this Act.	Misdemeanour <i>Id.</i> s. 54.	
MARRIAGE.		
Solemnizing in unlawful place or without due notice.	Felony 6 & 7 Will. 4, c. 85, s. 39.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Registrar issuing licence for void marriage.	Felony 7 Will. 4 & 1 Vict. c. 22, s. 3.	do. do.
MERCHANDISE Marks Act, 1887.		
Offences against this Act	Misdemeanour 50 & 51 Vict. c. 28, ss. 2, 11.	2 yrs. impt. w. or wt. h. l. or fine, or both, and to forfeiture of articles.
MINES.		
Forging or uttering false certi- ficate.	Misdemeanour 50 & 51 Vict. c. 58, s. 32.	2 yrs. impt. w. or wt. h. l.
MINISTERS.		
Obstructing clergymen or mini- sters.	Misdemeanour 24 & 25 Vict. c. 100, s. 36.	do. do.
MUNICIPAL Corporations.		
Misappropriating securities ..	Misdemeanour 45 & 46 Vict. c. 50, s. 117.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
NUISANCE.		
Committing act to the common nuisance.	Misdemeanour at com- mon law.	Fine or impt. wt. h. l., or both.
OBSCENE Books.		
Selling or publishing	do. do.	Fine or impt. w. or wt. h. l., or both.
Obscene Prints.		
Selling or obtaining and pro- curing with intent to sell.	do. do.	do. do.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
OFFICER, Public.		
Refusing to serve as	Misdemeanour at com- mon law.	Fine or impt., or both.
Neglect of duty by	do. do.	do. do.
OFFICIALS.		
Disobedience by, to orders of magistrates.	do. do.	Fine or impt. wt. h. l., or both.
PERSONATION.		
In respect of execution of legal document.	Felony 24 & 25 Vict. c. 98, s. 34.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
PIRACY.		
(Not fighting pirates)	Misdemeanour 8 Geo. 1, c. 24, s. 6.	6 mos. impt.
POACHING.		
Poaching by night after two previous convictions.	Misdemeanour 9 Geo. 4, c. 69, s. 1.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Offender committing above offence assaulting anyone authorized to apprehend him.	Misdemeanour <i>Id.</i> s. 2.	do. do.
Killing hare or rabbit in warren by night.	Misdemeanour 24 & 25 Vict. c. 96, s. 17.	Fine or impt., or both.
POISONING.		
Administering poison so as to endanger life or inflict griev- ous bodily harm.	Felony 24 & 25 Vict. c. 100, s. 23.	10 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Administering poison with in- tent to injure.	Misdemeanour <i>Id.</i> s. 24.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
POOR.		
Parish officer promoting mar- riage.	Misdemeanour 7 & 8 Vict. c. 101, s. 8.	Fine or impt., or both.
Wilfully injuring rate-book or giving false evidence to As- sessment Committee.	Misdemeanour 25 & 26 Vict. c. 103, s. 40.	do. do.
Wilfully deserting pauper pro- ceeding to Ireland.	Misdemeanour 26 & 27 Vict. c. 89, s. 4.	10l. fine or, in default, 3 mos. impt.
POST Office.		
Person employed in, opening or delaying letters.	Misdemeanour 7 Will. 4 & 1 Vict. c. 36, s. 25.	Fine or impt. w. or wt. h. l., or both.
Person employed stealing, &c., letters.	Felony <i>Id.</i> s. 26.	7 yrs. p. s. or 3 yrs. impt.
Stealing letter or opening letter- bag.	Felony <i>Id.</i> s. 29.	14 yrs. p. s.
Fraudulently retaining letters..	Misdemeanour <i>Id.</i> s. 31.	Fine or impt. w. or wt. h. l.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
Post Office—continued.		
Injuring letter boxes	Misdemeanour 47 & 48 Vict. c. 76, s. 3.	12 mos. impt. w. or wt. h. l.
Sending explosives, &c., in postal packet, or indecent prints.	Misdemeanour <i>Id.</i> s. 4.	do. do.
Opening or impeding delivery of letters.	Misdemeanour 54 & 55 Vict. c. 46, s. 10.	6 mos. impt. w. or wt. h. l., or 50 <i>l.</i> fine.
Endavouring to procure an- other person to commit felony or misdemeanour under Post Office Acts.	Misdemeanour 7 Will. 4 & 1 Vict. c. 36, s. 36.	2 yrs. impt. w. or wt. h. l.
Officials of post office disclosing contents of telegrams.	Misdemeanour 31 & 32 Vict. c. 110, s. 20.	12 mos. impt. w. or wt. h. l.
POUND Breach	Misdemeanour at com- mon law.	Fine or impt., or both, and recognizances.
PRINCIPALS in Second Degree and Accessories.		
Every principal in second degree and accessory before fact.	24 & 25 Vict. c. 96, s. 98; 24 & 25 Vict. c. 97, s. 56; 24 & 25 Vict. c. 98, s. 49; 24 & 25 Vict. c. 99, s. 35; 24 & 25 Vict. c. 100, s. 67.	Punishable same man- ner as principal first degree.
Accessory after the fact	Same statutes	2 yrs. impt. w. or wt. h. l.
PUBLIC Servant.		
Stealing by person in public service, or constable, &c.	Felony 24 & 25 Vict. c. 96, s. 69.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Public Stores.		
Applying marks without autho- rity.	Misdemeanour 38 & 39 Vict. c. 25, s. 4.	2 yrs. impt. w. or wt. h. l.
Destroying marks with intent to conceal His Majesty's prop- erty in stores.	Felony <i>Id.</i> s. 5.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Public Worship.		
Disturbing	Misdemeanour 52 Geo. 3, c. 155, s. 12.	40 <i>l.</i> fine.
RAILWAYS.		
Misconduct and neglect of rail- way servants.	Misdemeanour 3 & 4 Vict. c. 97, ss. 13, 14.	2 yrs. impt. w. or wt. h. l.
Obstructing engines.....	Misdemeanour 24 & 25 Vict. c. 97, s. 36.	do. do.
Endangering safety of person on railway.	Misdemeanour 24 & 25 Vict. c. 100, s. 34.	do. do.
Signing false accounts.....	Misdemeanour 31 & 32 Vict. c. 119, s. 5.	Fine and impt.
Signing false returns	Misdemeanour 34 & 35 Vict. c. 78, s. 10.	do.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
REAL ESTATE.		
Concealment of material document by vendors.	Misdemeanour 22 & 23 Vict. c. 35, s. 24.	2 yrs. impt. w. or wt. h. l.
Offences as to declaration of title.	Misdemeanour 25 & 26 Vict. c. 67, s. 44.	2 yrs. impt. w. or wt. h. l., or fine.
RECEIVING.		
Where theft a felony	Felony 24 & 25 Vict. c. 96, s. 91.	14 yrs. p. s. or 2 yrs. impt.; male under 16 whipping.
Where theft a misdemeanour ..	Misdemeanour <i>Id.</i> s. 95.	7 yrs. p. s. or 2 yrs. impt.; male under 16 whipping.
REWARD.		
Taking reward to discover stolen property.	Felony <i>Id.</i> s. 101.	do. do.
RIOT.		
Taking part in	Misdemeanour at common law.	Fine or impt. w. or wt. h. l., or both.
Rioters injuring buildings	Misdemeanour 24 & 25 Vict. c. 97, s. 11.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Riotously preventing loading of ship.	Misdemeanour 33 Geo. 3, c. 67, ss. 1, 2.	12 mos. impt. w. h. l.; on second conviction 14 yrs. p. s.
ROBBERY and Threats.		
Robbery from the person	Felony 24 & 25 Vict. c. 96, s. 40.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Assault with intent to rob	Felony <i>Id.</i> s. 42.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Demanding money with menaces.	Felony <i>Id.</i> s. 45.	do. do.
SAVINGS Bank.		
Adopting title of, unlawfully..	Misdemeanour 26 & 27 Vict. c. 87, s. 5.	Fine or impt., or both.
Officers receiving deposits and not accounting for same.	Misdemeanour <i>Id.</i> s. 9.	do. do.
SHIPS.		
Owner using certificate unlawfully.	Misdemeanour 57 & 58 Vict. c. 60, s. 16.	2 yrs. impt. w. or wt. h. l., or fine, and ship subject to forfeiture.
Master of British ship concealing or assuming nationality.	Misdemeanour <i>Id.</i> s. 70.	do. do.
Master or owner in default as to collision regulations.	Misdemeanour <i>Id.</i> s. 419.	do. do.

NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
Ships—continued.		
Master or owner obstructing service of process.	Misdemeanour 57 & 58 Vict. c. 60, s. 696.	2 yrs. impt. w. or wt. h. l., or fine.
Master forcing seaman on shore and leaving him behind.	Misdemeanour <i>Id.</i> s. 187.	do. do.
Master leaving seaman behind without agreement, sauction, or certificate.	Misdemeanour <i>Id.</i> s. 188.	do. do.
Destroying, &c., log book	Misdemeanour <i>Id.</i> s. 241.	do. do.
Officers of local marine board embezzling.	Felony <i>Id.</i> s. 248.	14 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Taking money for apprentice to sea service.	Misdemeanour <i>Id.</i> s. 398.	2 yrs. impt. w. or wt. h. l.
Master failing in duty on collision.	Misdemeanour <i>Id.</i> s. 422.	do. do.
Any person sending unseaworthy ship to sea.	Misdemeanour <i>Id.</i> s. 457.	do. do.
Master taking unseaworthy ship to sea.	Misdemeanour <i>Id.</i> s. 457.	do. do.
Selling wreck abroad	Felony <i>Id.</i> s. 535.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Pilots endangering ship, life or limb.	Misdemeanour <i>Id.</i> s. 607.	2 yrs. impt. w. or wt. h. l.
Failing to extinguish false lights.	Misdemeanour <i>Id.</i> s. 667.	As for common nuisance.

SMUGGLING.

Assembling for the purpose of smuggling.	Misdemeanour 42 & 43 Vict. c. 21, s. 10, & 39 & 40 Vict. c. 36, s. 188.	Fine not less than 100 <i>l.</i> or exceeding 500 <i>l.</i>
Procuring person so to assemble	Misdemeanour 39 & 40 Vict. c. 36, s. 189.	12 mos. impt. w. or wt. h. l.
While committing above offence being armed or disguised, or armed or disguised being found with smuggled goods within 5 miles of sea coast.	Misdemeanour <i>Id.</i>	3 yrs. impt. w. or wt. h. l.
Making signals to aid smuggler	Misdemeanour <i>Id.</i> s. 190.	Fine of 100 <i>l.</i> or 1 yrs. impt. w. or wt. h. l.
Shooting at revenue boats, or wounding officers.	Felony <i>Id.</i> s. 193.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.

SODOMY.

Attempting to commit.....	Misdemeanour 24 & 25 Vict. c. 100, s. 62.	10 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
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SPRING GUNS.

Setting spring guns or man-traps.	Misdemeanour <i>Id.</i> s. 31.	5 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
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NATURE OF OFFENCE.	STATUTE CREATING.	PUNISHMENT.
STAMPS.		
Unlawfully making, &c. paper in imitation of stamp paper.	Felony 54 & 55 Vict. c. 38, s. 14.	7 yrs. p. s. or 2 yrs. impt. w. or wt. h. l.
Unlawfully possessing paper, plates or dies used for stamps.	Misdemeanour <i>Id.</i> s. 15.	2 yrs. impt. w. or wt. h. l.
SUICIDE.		
Attempting to commit.....	Misdemeanour at com- mon law.	Fine or impt., or both.
TREASURE TROVE.		
Concealing	do. do.	Fine or impt., or both, and recognizances.
UNLAWFUL Assembly..	do. do.	Fine or impt. w. or wt. h. l., or both, and recognizances.

APPENDIX B.

Appellants' costs as between solicitor and client of appeal against refusal to renew licence. The owners of the house (a limited company) join with the licensee in the appeal.

	£	s.	d.
Attending Mr. Smith, licence holder of the Pig and Whistle Public-house, when he called upon me accompanied by Mr. Jones, manager of the ——— Brewery Co., who owned the house, and informed me that the justices at the adjourned licensing meeting had refused to renew the licence in consequence of a police objection that the house was of a disorderly character. Long and special attendance, when it was decided to appeal to quarter sessions and the company would join in the appeal, and I was to take the necessary steps	13	4	
Writing clerk of the peace enquiring date of the next practicable court of quarter sessions, and to let me know on what date appeal would probably be heard, and requesting him to send me print of the standing orders as to appeals	3	6	
Attending clerk to justices for ascertaining names and addresses of justices who refused renewal	6	8	
Drawing and fair copy authority for Mr. Jones to prosecute appeal and to enter into recognizance on behalf of company	6	8	
Writing him therewith, and with instructions as to the affixing of the company's seal, &c.	3	6	
Drawing notice of appeal			1s. per folio
Attending Mr. Smith and Mr. Jones, reading over and discussing notice of appeal, and they instructed me to have same settled by counsel	6	8	
Fair copy draft for counsel			4d. per folio
Drawing statement of facts for instruction of counsel, and briefly foreshadowing, so far as was possible at that stage, the nature of the evidence which appellants hoped to be in a position to call on the hearing of the appeal ..			1s. per folio
Fair copy same			4d. per folio
Attending counsel, Mr. ———, with papers	6	8	
Paid his fee and clerk			
Attending clerk to justices arranging for attendance of appellants on justice to enter into recognizances, and as to probable amount of the recognizances which appellants would be expected to enter into	6	8	
On receipt of draft notice of appeal settled by counsel, ——— copies * thereof for service			4d. per folio

* One copy for each justice, one for justices' clerk, one for superintendent of police, one for clerk of peace, and one to keep.

	£	s.	d.
Attending Mr. Smith for and obtaining his signature to notices of appeal.....	6	8	
The like Mr. Jones	6	8	
Service of notice on ———, Esq., J.P.	5	0	
Mileage *			
The like on ———, Esq., J.P.	5	0	
Mileage *			
The like on ———, Esq., J.P.	5	0	
Mileage *			
The like on ———, Esq., J.P.	5	0	
Mileage *			
The like on clerk to the justices.....	5	0	
The like on superintendent of police.....	5	0	
Paid railway fares, cabs and expenses			
Attending Mr. Smith and Mr. Jones, and with them on justice when they entered into the recognizances	13	4	
Paid fees of justices' clerk			
Instructions to apply for temporary authority pending appeal .	6	8	
Writing Commissioners of Inland Revenue with particulars of refusal, and for permission to carry on business pending appeal	3	6	
Writing superintendent of police with notice of recognizances, and informing him of service of notices of appeal on the justices, and that temporary authority had been applied for	3	6	
Writing clerk of the peace with copy notice of appeal, and requesting him to enter the appeal at the next quarter sessions; also acknowledging receipt of print of Standing Orders as to appeals	5	0	
Attending Mr. Smith and Mr. Jones when they instructed me to retain Mr. ——— and Mr. ——— as counsel on the appeal	6	8	
Attending Mr. ——— with retainer.....	6	8	
Paid his fee and clerk.....	1	3	6
Attending Mr. ——— with retainer.....	6	8	
Paid his fee and clerk	1	3	6
On receipt of authority from Commissioners of Inland Revenue, writing acknowledging receipt	3	6	
Writing Mr. Smith therewith	3	6	
Instructions for brief †.....			
Attending Mr. ———, surveyor, instructing him to prepare plan of premises	6	8	
Attending Mr. ——— ‡ (witness), taking minutes of his evidence			
The like Mr. ——— ‡ (witness)			
The like Mr. ——— ‡ (witness)			
Paid railway fares and expenses			

* 1s. per mile over two miles.

† This will cover all attendances upon appellants as to evidence, &c., and will vary in amount with the difficulty and importance of the case.

‡ 6s. 8d. or 13s. 4d. each witness, or more if the length of proof justifies.

	£	s.	d.
Attending clerk to licensing justices, inspecting Register of Licences and taking notes of convictions against Mr. Smith and previous tenants, dates of transfers, &c.; also bespeaking copy of notes of evidence given on the occasion of the refusal to renew the licence.....	6	8	
Drawing brief	1s.	per folio	
Two copies same	4d.	per folio	
Two copies of documents to accompany, as under :—			
Notice of objection			
Notice of appeal			
Recognizances			
Correspondence			
Justices' clerk's notes of evidence			
Attending Mr. ———, senior counsel, with brief, and appointing consultation	6	8	
Paid his fee and clerk			
Attending Mr. ———, junior counsel, with brief	6	8	
Paid his fee and clerk			
Writing Mr. Smith with appointment of consultation	3	6	
The like Mr. Jones	3	6	
Attending clerk of the peace for and obtaining ——— subpoenas for service on witnesses	6	8	
Paid for same			
Copies for service	1s.	each	
Service on witness, Mr. ———			
And mileage			
Paid him conduct money			
Service on witness, Mr. ———			
And mileage			
Paid him conduct money			
Letters to ——— witnesses as to day on which appeals would be heard, and with instructions as to attending court ...each	3	6	
Attending consultation at Mr. ———'s chambers, when same attended by junior counsel and by Mr. Smith and Mr. Jones	13	4	
Attending quarter sessions when appeal allowed and licence renewed, engaged two days [according to importance of case]	from 3 to 5	3 3 5 5	0 0
Paid railway fares and hotel bills, one night			
Paid court fees			
Paid witnesses as under :—			
Mr. ———			
Mr. ———			
Mr. ———			
Letters, postages, messengers, &c.			
Drawing bill of costs	1s.	per folio	
Two copies	4d.	per folio	
Writing Mr. Smith, with copy	3	6	
The like Mr. Jones	3	6	

*Respondent justices' costs of an appeal against the justices' refusal to renew appellant's beerhouse licence.**

	£	s.	d.
Instructions to appear for respondents.....	13	4	
HAVING received notice of appeal, perusing same	6	8	
Instructions for brief	4	4	0
Drawing same	1s.		per folio
Fair copy brief for senior counsel.....	4d.		per folio
Attending him with same	6	8	
Fair copy brief for junior counsel	4d.		per folio
Attending him with same	6	8	
Attending clerk of peace bespeaking four subpœnas.....	6	8	
Copy subpœna and service on superintendent.....	6	8	
„ „ „ sergeant.....	6	8	
„ „ „ police constable	6	8	
„ „ „ —————			
Journey to ———, attending consultation with counsel, going fully into the case, and discussing various points in the evidence	13	4	
Attending quarter sessions, instructing counsel when appeal heard and judgment given in favour of respondents	3	3	0
Paid railway fare, cab hire, &c., to convey registers.....	15	0	
Court crier's fees	2	0	
Fee to senior counsel and clerk			
Fee to junior counsel and clerk			
Drawing and two copies bill of costs. . 1s. per folio & 4d. per folio			
Attending for appointment to tax	3	4	
Notice of taxation, copy and service.....	5	0	
Journey to ———, attending taxation.....	13	4	
Paid railway fare			
Letters, &c.			

* The items in this precedent are taken from a taxed bill of costs. The amounts allowed on taxation vary with the importance of the case, and the practice differs at the different sessions.

Appeal against an order made by justices of the ——— Petty Sessional Division, inflicting a fine of £—— and costs for causing effluvia at appellant's works, which was a nuisance under sect. 14 of Public Health Act, 1875.

Respondent's costs of appeal to be taxed and paid, pursuant to order of quarter sessions,* dated ———.

	£	s.	d.
Instructions to oppose appeal.....	13	4	
Perusing notice of appeal	6	8	
Writing clerk of the peace as to the appeal, and enclosing list of ——— witnesses, and requesting him to send subpoenas for attendance of witnesses on respondent's behalf	3	6	
List of witnesses to enclose	2	0	
Writing magistrates' clerk for return of papers handed to court on previous hearing, and for copies of information, summons and order, and clerk's attendance at ——— with letter	3	6	
Paid for same.....	2	6	
Railway fares paid			
Instructions for brief, including numerous attendances on Mr. ——— (clerk to the council), the chairman, the surveyor, inspector of nuisances, medical officer, and on ——— witnesses who resided in various parts of ———, and taking minutes of their evidence, attending Mr. ———, C.E., the expert called in by the magistrates on previous hearing, conferring with him upon the question upon which he should give his attention, perusing correspondence, certificates of medical men, complaints received from inhabitants, reports of medical officer, surveyor, and inspector of nuisances; shorthand notes of hearing at petty sessions, letters and telegrams, &c. &c.	13	13	0
Drawing brief	at 1s.	per folio	
Two fair copies for counsel	at 4d.	per folio	
Copies of the following documents to accompany briefs:—			
Two fair copies of the following documents:—			
Transcript of shorthand notes	at 4d.	per folio	
Information			
Summons			
Orders			
Report of inspector of nuisances			
Notice of appeal			

* The items in this precedent are taken from a taxed bill of costs.

	£	s.	d.
Attending senior counsel with brief		6	8
Fee to him and clerk			
Attending junior counsel with brief		6	8
Fee to him and clerk			
Attending senior counsel appointing consultation		3	4
Paid his fee and clerk			
Attending junior counsel, informing him		3	4
Fee him and clerk	1	3	6
Attending consultation with counsel	13	4	
Writing clerk of peace bespeaking two subpoenas <i>duces tecum</i> ..	3	7	
Making copies of subpoenas for service on like number of witnesses			at 6d. each
Journey to ———, serving subpoenas on witnesses.			at 2s. 6d. each
Mileage			
Writing appellant's solicitors, with notice to produce certain documents on hearing of appeal	3	7	
Journey to ———, attending court on hearing of appeal, when same dismissed with costs	3	3	0
Railway fares and expenses paid of crier of court			
Attending for order of quarter sessions (or correspondence) ..	3	4	
Paid for same and sessions fees.			
Copy for service	1	0	
Service thereof	5	0	
Copy for service on clerk to magistrates	1	0	
Attending serving clerk to magistrates	5	0	
Drawing bill of costs			1s. per folio
Copy for appellant's solicitors			4d. per folio
Attending for appointment to tax (or correspondence)	3	4	
Notice and copy	1	6	
Service of same	2	6	
Attending taxing	1	1	0
Paid railway fares and expenses			
Letters, messengers, postages, &c. &c., not otherwise charged	1	1	0

Costs of Respondents of and incident to an appeal to quarter sessions against a poor rate for the Parish of ———, made on the ——— day of ———.

	£	s.	d.
Attending Assessment Committee, putting notice of appeal before them when they instructed me to oppose the appeal and to obtain the guardians' consent to their appearing as respondents.....	1	1	0
Attending clerk to guardians and arranging for the guardians to be informed of the appeal, and for their authority to be given to the Assessment Committee to appear as respondents, which was given	13	4	
Writing assistant overseer for copy of present entry of assessment in his rate book	3	6	
Having received same, perusing	3	4	
Attending chairman with offer of appellants conferring, and advising at great length, and it was resolved to uphold the assessment	13	4	
Instructions for notice to produce	6	8	
Drawing same	1s.	per folio	
Fair copy	4d.	per folio	
Instructions for notice to admit	6	8	
Drawing same	1s.	per folio	
Fair copy	4d.	per folio	
Drawing proof of witness	1s.	per folio	
Fair copy proof	4d.	per folio	
Two fair copies for briefs			
Instructions for brief, including perusals of documents, minute books, reports of meetings, &c., &c.	10	10	0
Drawing brief	1s.	per folio	
Fair copy for leading counsel	4d.	per folio	
Fair copy for junior counsel	4d.	per folio	
Two fair copies of the following documents to accompany brief (4d. per folio) :—			
Notice of appeal to the Assessment Committee			
Notice of appeal to quarter sessions			
Extract from rate book			
Notice to admit			
Notice to produce			
Correspondence			
Minutes of Assessment Committee.....			
Minutes of guardians			
Certificates of Union Assessment Committee			
Attending senior counsel with brief	6	8	
Attending junior counsel with brief	6	8	
Having received notice that appeal would be heard on — inst., writing Mr. ——— (witness) with particulars of day and hour of hearing.....	3	6	

	£	s.	d.
Writing senior counsel fixing time for conference	3	6	
The like junior counsel	3	6	
Journey to ———, attending consultation with counsel	13	4	
Attending quarter sessions instructing counsel when appeal heard	3	3	0
Paid railway fares, cabs, &c.			
Paid court crier			
Fees to counsel (senior) and clerk			
Brief and consultations			
The like junior counsel			
Attending for appointment to tax.....	3	4	
Notice of taxation, copy and service.....	5	0	
Drawing bill of costs 1s. per folio			
Copy for taxation 4d. per folio			
Journey to ——— attending taxation	1	1	0
Railway fares			

If the appeal is abandoned, substitute such of the following items as are applicable :—

	£	s.	d.
Having received letter from appellants' solicitor stating that he abandoned the appeal—			
Perusing same	3	4	
Preparing telegram to [chief witness] informing him thereof, and despatching.....	3	4	
Paid			
Writing chairman of Assessment Committee informing him of abandonment	3	6	
Writing appellants' solicitor fully thereon	3	6	
Attending clerk of the peace and appellants' solicitor arranging to make application to sessions for costs, and that the appellants would not appear, and taking written note to that effect	6	8	
Instructions for brief to apply for costs, including perusal of notice of abandonment and agreement as to application for costs	13	4	
Drawing same 1s. per folio			
Fair copy for counsel			
Fair copy notice of abandonment to accompany.....			
The like agreement as to application for costs			
Attending counsel, briefing him, and conferring and advising..	6	8	
Paid counsel's fees			
Journey to ———, attending court on application for costs when granted.....	1	1	0
Paid railway fare			

*Respondent justices' costs on appeal against a conviction.**

	£	s.	d.
Having received notice of appeal perusing same	6	8	
Instructions to defend, including inquiry as to due service of the notices	13	4	
Attending at magistrate's clerk's office to inquire as to recognizances	6	8	
Attending senior counsel, retaining him as leader	6	8	
The like junior counsel, retaining him as junior	6	8	
Instructions for brief	1	1	0
Drawing same			1s. per folio
Two fair copies for counsel			4d. per folio
Two fair copy notices of appeal.....			
Attending on magistrate's clerk to obtain list of previous convictions against the house	6	8	
Writing superintendent instructing him to warn witnesses when to attend sessions	3	6	
Attending deputy-magistrate's clerk arranging for him to produce register at —— without issuing a subpoena....	6	8	
Attending senior counsel, delivering brief and arranging as to consultation	6	8	
The like junior counsel.....	6	8	
Attending consultation	13	4	
Journey to ——, attending sessions when appeal dismissed with costs	3	3	0
Paid railway fare and expenses	15	0	
Paid senior counsel:—			
Brief			
Consultation			
Paid junior counsel			
Paid clerk of court	2	0	
Paid witnesses:—			
Magistrate's clerk.....	1	10	0
Police inspector. 10s.; railway fare, 5s.	15	0	
,, sergeant, 7s. 6d.; ,, 5s.	12	6	
,, constable, 5s.; ,, 5s.	10	0	
Drawing (1s. per folio) and two copies (4d. per folio) bill of costs.....			
Attending for appointment to tax.....	3	4	
Notice of taxation, copy and service.....	5	0	
Journey to —— attending taxation	1	1	0
Paid railway fare			

* The items in this precedent are from a taxed bill of costs.

*Appellants' costs of an appeal against an order adjudging L. J., a pauper, to be settled in the union of the appellant guardians.**

	£	s.	d.
Having received order of removal of L. J. and her children, and proceeds thereof, with notice of chargeability, perusing same.....		6	8
Attending appellants, advising thereon and receiving instructions to appeal		6	8
Letter to clerk of the peace at Barchester to know date of next quarter sessions and subsequent sessions		3	7
On receipt of letter from clerk of the peace, writing acknowledging			
Letter to pauper's father that we wished to see him, and for appointment		3	7
Letter to superintendent of the Barchester workhouse infirmary that we wished to have an interview with L. J. respecting her settlement, and for an appointment		3	7
Having received reply that pauper had been removed to the workhouse, letter to the master with appointment for us to see her.....		3	7
Letter to pauper's father in reply, and with appointment		3	7
Attending pauper's father conferring hereon, and obtaining from him information as to L. J.'s life and probable settlement and taking notes thereon		6	8
Journey to Barchester, attending L. J. at the workhouse, conferring and obtaining information from her, and taking notes thereof	3	3	0
Paid railway fares, cabs and expenses			
Letter to London agents with instructions to search for certificates of birth of children of L. J.		3	7
Letter to pauper's father requesting more information on certain points		3	7
Having received letter from agents that they had searched the general index of births for the whole of England and Wales, but could not find the entries required—writing them with their charges		3	7
Paid same			
Drawing list of questions as to birth of children to be answered by L. J., and fair copy		5	0
Writing L. J. with list of questions		3	7
Attending appellants, reporting result of inquiries made, when instructions to appeal against the order of removal were confirmed		6	8
Letter to magistrate's clerk at Barchester for copy depositions ..		3	7

* In a settlement appeal the steps taken by the appellants, to prove that the pauper had not gained a settlement in their union and (as is sometimes done) to suggest an alternative settlement, must vary with the circumstances of each case. Such steps, therefore, are only indicated generally, and not in detail, in the following precedent.

	£	s.	d.
Letter to magistrate's clerk acknowledging receipt of copy depositions and enclosing amount of fee for same	3	7	
Paid fee			
Perusing depositions (folios 10)	3	4	
Letter to L. J. acknowledging receipt of questions answered..	3	7	
Perusing and considering replies and effect on alleged settlement.....	5	0	
Letter to clerk of the peace to know when sessions would be held and what rules they had with respect to entry of appeal	3	7	
Instructions for notice of appeal	6	8	
Drawing same (folios 3)	3	0	
Two fair copies thereof for service and duplicate	2	0	
Attending at post-office despatching notice to clerk to guardians at Barchester by registered post, and paid	3	9	
Letter to clerk of peace, with copies of order and grounds of removal and notice of appeal, and to enter appeal, when we would instruct counsel to apply for respite thereof to next sessions	3	7	
Two copies for clerk of peace and counsel:—			
Order of removal			
Grounds of removal			
Notice of appeal at 4d. per folio			
Instructions for brief to counsel on application to enter and respite appeal.....	13	4	
Drawing same			1s. per folio
Fair copy			
Attending Mr. ——— (junior counsel) therewith	6	8	
Paid his fee and clerk	2	4	6
Writing clerk to respondent guardians that we had instructed counsel to apply for respite of appeal	3	7	
Letter to clerk of peace with postal order for fee on entering appeal	3	7	
Paid for order			
Letter to superintendent registrar at Berwick for certificates of birth of L. J.'s children	3	7	
The superintendent registrar having replied that he was unable to find the entries, writing him in reply to make further search under other surname	3	7	
Writing L. J. that we would call upon her on ———, and to produce rent books and receipts for rent, and for further information	3	7	
Journey to Barchester attending L. J., conferring as to conflicting statements of herself and her father and going fully into matter with her, taking notes of her further statements	3	3	0
Attending at Poor Law Offices, Barchester, ascertaining that Grace Street and Bruce Street (where L. J. had formerly lived) were both in City of Barchester	6	8	
Drawing grounds of appeal			1s. per folio
Fair copy			4d. per folio

	£	s.	d.
Instructions for case to counsel to settle grounds of appeal and to advise		6	8
Drawing same		1s.	per folio
Fair copy		4d.	per folio
Copy of following documents to accompany (at 4d. per folio):—			
Order of removal			
Grounds of removal			
Notice of appeal			
Statements of L. J. and other witnesses			
Attending counsel therewith		6	8
Paid his fee and clerk, settling grounds of appeal and to advise			
The superintendent registrar at Berwick having ascertained that children were registered under name of James, writing him with amount of fees for search and copy certificates ..		3	7
Paid same			
Letter to clerk of peace at Barchester to know date of next quarter sessions, and as to time for delivery of grounds of appeal ..		3	7
On receipt of answer from clerk of peace, writing acknowledging same		3	7
Letter to father of L. J. with appointment, and enclosing list of questions to be answered		3	7
Drawing list of questions and fair copy		5	0
Journey to Castleton attending on father of L. J., conferring as to previous statements of himself and L. J., obtaining information and taking full notes thereof	1	1	0
Attendances at Castleton on superintendent registrar to obtain certificate of birth of child of L. J., and on house agents and others to ascertain length of time during which L. J. lived in the city, &c.			
Letter to superintendent registrar at Berwick to ascertain in what parish Alpha Street and Beta Street are situate		3	7
Making three copies grounds of appeal as settled by counsel			
4d. per folio			
Letter to clerk of the peace at Barchester with grounds of appeal		3	7
Attending to register same, and paid		3	4
Letter to clerk to the guardians with grounds of appeal		3	7
Attending to register same, and paid		3	4
Attending appellants, conferring and advising and receiving instructions to brief senior and junior counsel			
Writing senior counsel's clerk that we had to-day been instructed to send him brief, and as to date of sessions		3	7
The like junior counsel's clerk		3	7
Instructions for case to counsel, and to advise on evidence		6	8
Drawing same		1s.	per folio
Fair copy		4d.	per folio
Copy of documents to accompany (at 4d. per folio):—			
Order of removal			
Grounds			
Notice of appeal			
Grounds			
Statements of witnesses			
Certificates of births and deaths			

	£	s.	d.
Attending senior counsel therewith	6	8	
Paid his fee and clerk			
Drawing notice to respondents to inspect and admit documents at 1s. per folio			
Fair copy			at 4d. per folio
Instructions for notice to respondents to admit facts	6	8	
Drawing same			1s. per folio
Fair copy			4d. per folio
Letter to respondent's solicitors, with notices to inspect and admit and to admit facts	3	7	
Attending to register same, and paid	3	4	
Attending respondent's solicitors on their examining documents	6	8	
Letter to clerk of peace acknowledging receipt of his letter giving us date of sessions	3	7	
Letter to senior counsel giving him date of sessions, and as to consultation	3	7	
The like junior counsel	3	7	
Letter to respondent's solicitors acknowledging receipt of their letter, with admission of and notice to admit facts	3	7	
Perusing respondent's admission of facts			at 1s. per folio
Perusing respondent's notice to admit facts			at 1s. per folio
Perusing respondent's notice to inspect and admit documents at 1s. per folio			
Instructions for replies thereto	6	8	
Drawing same			1s. per folio
Fair copy			4d. per folio
Instructions to counsel to settle appellant's admission of facts, and to advise	6	8	
Drawing same			1s. per folio
Fair copy			4d. per folio
Copy respondent's notice to accompany			4d. per folio
Attending counsel therewith	6	8	
Paid his fee and clerk, settling statement, and to advise			
Attending at Crown office, issuing subpœna	6	8	
Paid issuing, 5s. ; and parchment, 6d.	5	6	
Making copies thereof			4d. per folio
Letter to agents instructing them to serve Crown office sub- pœnas <i>duces tecum</i> , and for clerk to attend sessions to prove service; also to inquire as to documents in possession of witnesses	3	7	
Two fair copies admissions as settled by counsel for service and duplicate			4d. per folio
Letter to respondent's solicitors therewith, and as to time when appeal would be taken	3	7	
Attending to register same, and paid	3	4	
On receipt of letter from respondent's solicitors asking us to admit constitution of parish of Castleton, as stated by them—writing them we would make inquiries	3	7	
Attending at Castleton obtaining information as to parish of Castleton, and perusing order constituting same	1	1	0
Writing respondent's solicitors that we admitted constitution of parish as stated by them	3	7	

	£	s.	d.
Instructions for brief	5	5	0
Drawing same	at 1s. per folio		
Two fair copies for counsel	at 4d. per folio		
Two copies of each of the following documents, 4d. per folio :—			
Order of removal			
Notice of chargeability			
Grounds of removal			
Particulars of settlement			
Depositions			
Notice of appeal			
Grounds of appeal			
Respondent's notice to admit facts			
Respondent's notice to inspect and admit			
Appellant's notice to inspect and admit			
Appellant's notice to admit facts			
Appellant's admission of facts			
Respondent's admission of facts			
Attending senior counsel with brief and papers	1	1	0
Paid his fee and clerk			
Attending junior counsel with brief and papers	13	4	
Paid his fee and clerk			
Attending senior counsel to appoint conference	6	8	
Paid his fee and clerk			
Attending junior counsel to appoint conference	6	8	
Paid his fee and clerk			
Attending conference	13	4	
Journey to Barchester, attending sessions on hearing of appeal when judgment reserved	5	5	0
Paid railway fares, cabs and expenses			
Letter to respondents' solicitors suggesting that on delivery of judgment junior counsel only should be present	3	7	
Letter to respondents' solicitors agreeing to tax out of sessions.	3	7	
On receipt of letter from respondents' solicitors agreeing to our suggestion as to junior counsel, writing clerk to senior counsel that junior counsel only would attend on delivery of judgment	3	7	
The like to clerk to junior counsel	3	7	
Journey to Barchester attending sessions when judgment delivered allowing appeal with costs	5	5	0
Paid railway fare and expenses			
Drawing bill of costs for taxation	1s. per folio		
Copy for taxing officer	4d. per folio		
Fair copy for respondents' solicitors	4d. per folio		
Letter to clerk of the peace with one copy and for appointment to tax	3	7	
Notice of taxation	1	6	
Service thereof and copy costs on respondents' solicitors	2	6	
Journey to Barchester attending taxation	2	2	0
Paid railway fares and expenses			
Postages, telegrams, &c.			

*Respondents' costs of an appeal against an order adjudging L. J. a pauper to be settled in the union of the appellants guardians.**

	£	s.	d.
Attending appellants' solicitor on his handing me notice to enter and respite appeal, and requesting me to appear and assent thereto by counsel.....	6	8	
Attending respondent guardians and taking instructions to support order	6	8	
Perusing notice to enter and respite	2	6	
Drawing brief to counsel to consent to respite 1s. per folio			
Fair copy			4d. per folio
Attending counsel with brief and papers.....	6	8	
Attending at sessions when counsel applied to enter and respite appeal.....	13	4	
Sessions fee.....	15	0	
Perusing notice and grounds of appeal.....	5	0	
Attending on respondents and discussing grounds of appeal ..	3	4	
Attending L. J. at the Union workhouse, going fully into the facts of the case	6	8	
Journey to and attendances on sister and father of L. J., conferring fully as to residence of L. J.....	1	1	0
On receipt of letter from appellants' solicitor asking for appointment to see pauper L. J., writing him that pauper could be seen at the workhouse at any time.....	3	7	
Instructions for brief	3	3	0
Drawing same			1s. per folio
Two fair copies.....			4d. per folio
Two copies of following documents to accompany brief (at 4d. per folio):—			
Order of removal			
Notice of chargeability and grounds of removal.....			
Depositions			
Notice to enter and respite			
Grounds of appeal and notice of trial			
Certificate of chargeability			
Correspondence			
Attending senior counsel with brief	6	8	
The like junior counsel.....	6	8	
Attending senior counsel appointing consultation	6	8	
The like junior counsel	6	8	
Journey to ——— and attending consultation	1	1	0
Railway fares and expenses			

* The items in this precedent are from a taxed bill.

	£	s.	d.
Attending at the office of the clerk of the peace, obtaining subpœnas <i>ad test.</i>		3	4
Three fair copies for service		3	0
Service thereof on witnesses each		5	0
Mileage 1s. per mile			
Endorsing memoranda of service on original subpoena		3	0
Attending witness, conferring as to her evidence, and arranging that she should attend on hearing of the appeal		6	8
Perusing appellants' notice to produce		2	6
Drawing notice to produce 1s. per folio			
Copy for service 4d. per folio			
Writing therewith to appellants' solicitor		3	7
Drawing further observations to counsel and proofs of witnesses 1s. per folio			
Two fair copies 4d. per folio			
Two fair copies notice to produce			
Attending senior counsel therewith		3	4
The like junior counsel		3	4
Appellants having requested us by their notice to produce various books and papers at the trial, searching through guardians' minute book for and marking out entries relating to appeal		5	0
Attending workhouse master searching admission and discharge book for entries relating to pauper L. J., arranging for master to produce books on hearing of the appeal		6	8
Attending hearing of appeal when order confirmed	2	2	0
Drawing bill of costs 1s. per folio			
Copy for appellants' solicitor 4d. per folio			
Copy for clerk of the peace 4d. per folio			
Attending for appointment to tax		3	4
Drawing fair copy notice to tax		1	0
Letter to appellants' solicitor therewith		3	7
Attending taxation		6	8
Allocation and service		2	6
Sessions fee	15	0	

APPENDIX C.*

Scheme of the London County Council for regulating holding of Courts of Quarter Sessions for the County of London, approved by the Secretary of State on the 24th day of March, 1902, as provided by sect. 42 (7) of the Local Government Act.

Generally.

1. The provisions of the Act 11 Geo. 4 & 1 Will. 4, c. 70, as to the times for holding quarter sessions, shall not apply to the County of London.

2. Quarter sessions shall be held at Clerkenwell and at Newington in the months of January, April, July, and October in every year, and the first session held in each of those months shall be general quarter sessions.

3. Adjourned quarter sessions shall be held at Clerkenwell in each of the months aforesaid at an interval of not less than two weeks or more than three weeks after the beginning of each quarter sessions held at Clerkenwell.

4. Adjourned quarter sessions shall be held at Newington in the months of February, May, August, and November.

5. A general session shall be held at Clerkenwell in every month except in the months hereinbefore appointed for the holding of quarter sessions at Clerkenwell.

6. General sessions shall be held at Newington in the months of March, June, September and December in every year, and oftener, if need be.

7. An adjourned general session shall be held at Clerkenwell, for the disposal of business arising on the north side of the River Thames, in every month (except in the months hereinbefore appointed for the holding of quarter sessions at Clerkenwell), and shall begin at an interval of not less than two weeks or more than three weeks after the beginning of the general session.

8. In the month of November in every year the clerk of the peace for the County of London shall prepare lists showing the days to be fixed for the sessions to be held at Clerkenwell and Newington respectively during the ensuing year in accordance with the foregoing provisions. In the lists so to be prepared special days shall be appointed for hearing

* See p. 191.

appeals. The lists so to be prepared shall be laid before the November general sessions at Clerkenwell and the December general sessions at Newington respectively, and shall be revised and settled by such sessions respectively, and be printed on one paper in two parts or divisions, and be issued by the clerk of the peace for the County of London; and sessions in accordance with such lists, when so revised and settled, shall be held during the year at Clerkenwell and Newington respectively. Provided that, during the tenure of office of the existing clerk of the peace for the County of Surrey, the list of the sessions to be held at Newington shall be prepared by him on a separate list, and such list, when revised and settled as aforesaid, shall be printed as a separate paper, and issued by him and not by the clerk of the peace of the County of London.

9. The sessions so fixed shall so far as practicable be continued from day to day until the business to be dealt with at such sessions is completed. And it shall be the duty of the justices to take the steps necessary to secure that there shall be as many courts sitting at the same time as may be required for the discharge of the business with proper expedition. For this purpose, (a) so long as the present chairman holds office, in addition to the court presided over by the chairman, there may be a second court, to be presided over by a person nominated in accordance with 14 & 15 Vict. c. 55, s. 15, and on the direction of the county council approved by the Secretary of State, in pursuance of sect. 42 (6) of the Local Government Act, 1888, a third court, to be presided over either by a deputy, as prescribed by 37 Vict. c. 7, s. 3, or by one of the justices, and a fourth court to be presided over by one of the justices. Any of the above courts may be held at the same time at Clerkenwell and at Newington, and, subject to the provisions of this scheme, shall be so held whenever necessary to prevent delay in the disposal of pending business; but only one nomination may be made under 14 & 15 Vict. c. 55, s. 15, and only one under 37 Vict. c. 7, s. 3.

(b) Upon the present chairman ceasing to hold office there may be held at the same time at Clerkenwell and at Newington, separate courts of quarter sessions, and each of such courts may divide itself into two or more courts as may be necessary.

10. Every court of sessions of the peace held at Clerkenwell and at Newington, and every adjournment thereof, shall have the same jurisdiction in every respect, including the power of hearing and determining appeals, as if such court were quarter sessions, and every session shall, as circumstances require, be deemed to be quarter or general sessions, and, if held at different places, to be original or adjourned sessions, and, if held simultaneously at two or more places, to be divided courts of the same sessions.

11. The clerk of the peace for the County of London shall (save as hereinafter mentioned) take all necessary and proper steps to convene all sessions, and shall issue all necessary precepts to the sheriff to secure the due attendance there of the grand and petty juries; provided that during the tenure of office of the existing clerk of the peace for the County of Surrey all such duties shall, as respects the sessions to be held at Newington, be performed by him.

12. Upon the present clerk of the peace for Surrey ceasing to hold office, the clerk of the peace for the time being of the County of London shall perform all the duties which are by law or by this scheme imposed upon the clerk of the peace for Surrey in respect of the County of London.

13. Cases triable at quarter sessions and all other business to be disposed of at quarter sessions and arising on the north side of the River Thames shall be heard, determined, and disposed of at the sessions held at Clerkenwell; and cases triable at quarter sessions and all other business to be disposed of at quarter sessions and arising on the south side of the River Thames shall be heard, determined, and disposed of at the sessions held at Newington.

14. All depositions, recognizances, notices, and other documents and things relating to cases triable, or business to be disposed of at quarter sessions and required by law to be transmitted to quarter sessions or to the clerk of the peace shall, in respect of all cases and matters arising north of the River Thames, be transmitted to the clerk of the peace for the County of London; and in respect of all cases and matters arising south of the River Thames, shall be transmitted to the present clerk of the peace for the County of Surrey, and upon his ceasing to hold office, shall be transmitted to the clerk of the peace for the time being of the County of London.

15. It shall be the duty of the justices to take care that the above provisions for the disposal of business arising north and south respectively of the River Thames shall, so far as reasonably practicable, be strictly observed. Nevertheless, a committal for trial or recognizance shall not be invalidated, nor shall the powers of the sessions be affected by any disregard of the provisions of this scheme, as to the place or time of trial, and every court of sessions held in and for the County of London, at whatever place or time such court is held, shall have complete power to hear, determine, and dispose of any case or matter arising in the County of London, notwithstanding an objection that such case or matter ought to be heard and determined at the sessions held at another place or at another time.

16. Nothing in this scheme shall affect or take away any power given by law to the present chairman of quarter sessions, or to the present clerk of the peace for the County of London, or to the present clerk of the peace for the County of Surrey.

As to appeals under the Valuation (Metropolis) Act, 1869.

1. At every adjourned January quarter sessions held at Clerkenwell, sittings of the court shall be fixed to hear appeals under the Valuation (Metropolis) Act, 1869.

2. Such sittings shall begin not earlier than the 1st February then next, and shall be so arranged as to enable the court to determine all appeals (except where a valuation list or valuation is ordered) before the ensuing 31st March.

3. The court shall at the same session appoint, with the consent of the Local Government Board, a clerk and other persons to assist the sessions in the performance of their duties under the Act.

4. A separate list shall be prepared of appeals relating to property in the City of London, and prior to the hearing of such appeals the clerk of the court (appointed under Order 3) shall send seven days' previous notice to the clerk of the peace of the City of London, for the information of the members of the court of quarter sessions of the City of London appointed by that court to attend and sit as members of the quarter sessions for the County of London upon the hearing of such appeals.

5. Appeals may be heard at Clerkenwell, or at Newington, or in the City of London, or at some or all of such places, at the same time, or at different times, as the Court shall from time to time determine.

6. At every April quarter session held at Clerkenwell, the court shall assign the remuneration (subject to the approval of the Local Government Board) of the clerk and other officers appointed as aforesaid for the year ended the 31st March.

7. A separate account shall be kept of the expenses incurred by the sessions in respect of the exercise of its jurisdiction under the Act, and such account made up to the 31st March in every year shall be submitted to and be examined by the court of the April quarter sessions held at Clerkenwell.

8. Such account, when approved by the court, shall be submitted by the clerk of the court (appointed under Order 3) for such audit as may be directed by the Local Government Board, with a view that the same, when audited, may be paid in manner prescribed by the Valuation (Metropolis) Act, 1869.

APPENDIX D.*

NOTE ON

Reg. v. Brown (1890), 24 Q. B. D. 357, and
Reg. v. Ring (1892), 66 L. T. R. N. S. 300; 61 L. J. M. C. 116.

IN these cases the Court for the Consideration of Crown Cases Reserved is generally considered to have overruled *Reg. v. Collins* ((1864) L. & C. 471; 9 Cox, C. C. 497; 33 L. J. M. C. 177; 10 L. T. R. N. S. 581), and it is believed that since these cases the view that *Reg. v. Collins* has been effectively overruled has been generally acted upon.

The present editors desire to submit the following observations upon *Reg. v. Brown* and *Reg. v. Ring* to the consideration of the profession.

The question involved in *Reg. v. Collins* was whether a man can be convicted of an attempt to commit a crime, the commission of which, in the manner proposed, was in fact impossible? *Reg. v. Collins* answered this question in the negative.

The authorities at the date of *Reg. v. Brown* (1889) stood thus:—

In *Reg. v. McPherson* ((1857) 1 D. & B. 199) the prisoner had been convicted for breaking and entering a dwelling-house, and attempting to steal therein certain goods *which were not there*. The conviction was quashed by Cockburn, C. J., Coleridge, Crowder and Willes, JJ., and Bramwell, B., after argument by counsel for the Crown, no counsel appearing for the prisoner.

Each member of the court separately expressed a clear opinion that the conviction was bad. Cockburn, C. J., said: "The word *attempt* clearly conveys with it the idea, that if the attempt had succeeded the offence charged would have been committed, and therefore the prisoner might have been convicted if the things mentioned in the indictment, or any of them, had been there; but *attempting to commit* a felony is clearly distinguishable from *intending to commit* it. An

* See p. 332.

attempt must be to do that which, if successful, would amount to the felony charged."

Baron Bramwell, in the course of the argument, said this : "The argument that a man putting his hand into an empty pocket might be convicted of attempting to steal, appeared to me at first plausible ; *but suppose a man, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of attempting to murder the man he took it to be ?*"

Reg. v. Collins raised the very case of a man putting his hand into an empty pocket, with felonious intent, which had been put in *Reg. v. McPherson*. Cockburn, C. J., Williams and Crompton, JJ., and Martin, B., and Bramwell, B., held that a conviction for attempting to steal in such a case would not stand. This case was decided after argument by counsel both for the Crown and for the prisoner. The counsel for the Crown was Poland.

So the law rested until 1889, when *Reg. v. Brown* came up for decision. In that case a boy had been convicted of an attempt to commit an unnatural offence upon a fowl, and the court affirmed the conviction, *it being treated as clear that as a fact the offence could have been committed*.

The case had been stated upon a doubt arising whether a fowl was an animal within 24 & 25 Vict. c. 100, s. 61, and it seems perfectly clear that the question upon which *Reg. v. McPherson* and *Reg. v. Collins* were decided did not arise in any way for decision.

No counsel appeared either for the Crown or the prisoner, and the only judgment delivered was by Lord Coleridge, C. J., the other members of the court (Pollock, B., Field, Manisty, Cave, Day and Grantham, JJ.) merely concurring. In view of the fact that the possibility of committing the full offence was not in doubt, the discussion of *Reg. v. Collins* in the judgment seems to have been quite beside the mark, and the opinion that that case was bad law quite unnecessary to the decision.

In 1892 occurred the case of *Reg. v. Ring* (61 L. J. M. C. 116; 66 L. T. R. N. S. 300). Forrest Fulton, for the Crown, said that the case was stated with the object of ascertaining whether *Reg. v. Collins* was good law. Lord Coleridge, C. J., with the concurrence of Hawkins, Wills, Lawrance and Wright, JJ., said that *Reg. v. Collins* was not good law. The question was not argued by counsel for the prisoner, and the case, as stated, raised no such question as *Reg. v. Collins* decided. In *Reg. v. Ring* the question was not whether a man putting his hand into an empty pocket with intent to steal something which was not in fact there could be convicted of an attempt to steal, but whether the chairman of the County of London Quarter Sessions was right in leaving the case to the jury upon the following facts :—

The prisoners Ring, Atkins and Jackson were tried on an

indictment which charged them with an attempt to steal from the person of a person unknown, and with assaulting a person unknown with intent to commit a felony. At the trial it was proved that the three prisoners were seen to hurry on to the platform at the King's Cross Station of the Metropolitan Railway just as a train, which was going to Edgware Road, was about to start; they did not go by that train, and separated on reaching the platform. On the arrival of the succeeding train the prisoners crowded round and hustled a woman who was entering a compartment, and Atkins was seen to be endeavouring to find the pocket of her dress. The prisoners entered the train, got out of it at Gower Street Station, and there again crowded round and hustled a woman who was entering the train. Atkins again endeavoured to find her pocket. They re-entered the train, got out at Portland Road Station, entered the next train, and travelled in it to Baker Street Station, where they got out and were arrested. They were found to be in possession of tickets from King's Cross to Edgware Road. It seems clear that upon the facts so stated the question decided in *Reg. v. Collins* did not arise, and that for two reasons—

- (1) Because the conviction upon the count for assault, with intent to commit felony, was undoubtedly good in any case;
- (2) Because the question decided in *Reg. v. Collins* would only have arisen if it had appeared to be the fact that neither of the women who were hustled had anything in her pocket which could be the subject of larceny, and this did not appear.

It is to be observed that in *Reg. v. Collins* there was no proof at the trial as to whether there was or was not anything in the pocket capable of being stolen, but the court dealt with the case upon the footing that the question intended to be reserved for their opinion assumed that there was nothing in the pocket. *Reg. v. Collins* did not decide that where there was no evidence one way or the other the jury might not infer that there was something in the pocket capable of being stolen. Cockburn, C.J., in the judgment, said: "We are far from saying that if the question whether there was anything in the pocket had been laid before the jury there was not evidence upon which they might have found in the affirmative."

So much for the actual decisions. One other matter may be referred to. In 1879 the members of the Criminal Code Bill Commission (Lord Blackburn, Mr. Justice Barry, Mr. Justice Lush, and Mr. Justice Stephen) in their report, although they proposed to alter the law, nevertheless accepted *Reg. v. McPherson* and *Reg. v. Collins* as having settled the law on the subject.

Would the judges who decided *Reg. v. Brown* and *Reg. v. Ring* be prepared to hold that in the case put by Bramwell, B.,

in *Reg. v. McPherson*, of a man striking a blow at a stump of wood, believing it to be his enemy, a conviction of attempt to murder could be sustained? If not, how can such a case be distinguished from *Reg. v. Collins*?

It is to be observed that so far as concerns attempts to pick pockets, there is no urgency requiring the law as to attempts to be strained in order that guilty persons may not escape punishment, for no one has ever doubted but that in such cases the offender can be convicted of an assault with intent to commit felony.

The present editors submit that the question whether a man can be convicted of an attempt to commit a crime, the commission of which in the manner proposed, was in fact possible, has not been definitely settled in the affirmative by *Reg. v. Brown* and *Reg. v. Ring*.

APPENDIX E.

POOR PRISONERS' DEFENCE ACT, 1903.

3 EDW. VII. c. 38.

1.—(1.) Where it appears, having regard to the nature of the defence set up by any poor prisoner as disclosed in the evidence given or statement made by him before the committing justices, that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defence, and that his means are insufficient to enable him to obtain such aid—

- (a) The committing justices, upon the committal of the prisoner for trial; or
- (b) The judge of a court of assize or chairman of a court of quarter sessions, at any time after reading the depositions, may certify that the prisoner ought to have such legal aid, and thereupon the prisoner shall be entitled to have solicitor and counsel assigned to him subject to the provisions of this Act.

(2.) The expenses of the defence, including the cost of a copy of the depositions, the fees of counsel and solicitor and the expenses of any witnesses, shall be allowed and paid in the same manner as the expenses of a prosecution in cases of indictment for felony, subject, nevertheless, to any rules under this Act and to any regulations as to rates or scales of payment which may be made by one of His Majesty's principal Secretaries of State.

2. Rules for carrying this Act into effect may be made in the same manner and subject to the same conditions as Rules under the Prosecution of Offences Act, 1879.

3. In this Act—

“Prisoner” includes a person committed for trial on bail.

“Committing justices” includes a magistrate of the metropolis and a stipendiary magistrate.

“Chairman” includes recorder or deputy recorder or deputy chairman.

4. This Act shall not extend to Scotland and Ireland.

5. This Act may be cited as the Poor Prisoners' Defence Act, 1903, and shall come into operation on the first day of January, one thousand nine hundred and four.

STATUTORY RULES AND ORDERS, 1903.

No. $\frac{1150.}{L. 28.}$

CRIMINAL PROCEDURE, ENGLAND.

*REGULATIONS of the Secretary of State, dated
December 30th, 1903, as to the Allowances
which may be made under Section 1 (2) of the
Poor Prisoners' Defence Act, 1903.*

In pursuance of section 1 (2) of the Poor Prisoners' Defence Act, 1903, I hereby make the following Regulations as to the rates and scales of payment which may be made for the expenses of the defence:—

1. There may be allowed to the solicitor a fee not exceeding 2*l.* 2*s.* 0*d.*, provided that the presiding judge, after the conclusion of the trial, may, if he think fit, certify that the case was one of exceptional length or difficulty, and thereupon the fee may be increased to such sum as he may direct, but not in any case exceeding 5*l.*

In addition to such fee the solicitor may be allowed travelling expenses actually and necessarily incurred by himself and his clerk on the scale applicable to the travelling expenses of ordinary witnesses for a prosecution.

2. There may be allowed to counsel a fee of 1*l.* 3*s.* 6*d.*; provided that the presiding judge after the conclusion of the trial may, if he think fit, certify that the case was one of exceptional length or difficulty, and thereupon the fee may be increased to such sum as he may direct, but not in any case exceeding 3*l.* 5*s.* 6*d.*

3. There may be allowed to the clerk to the justices or other person by whom a copy of the depositions is supplied to the prisoner's solicitors payment for the same at the rate of twopence per folio of 90 words.

4. There may be allowed to witnesses giving professional evidence and to expert witnesses the same expenses as might be allowed to witnesses for a prosecution—provided that the said sum shall not in any case exceed one guinea a day, except in pursuance of a special order made by the presiding judge.

5. There may be allowed to other witnesses the same expenses as may be allowed to witnesses for a prosecution.

6. The travelling expenses of witnesses may be allowed as in the case of a prosecution.

7. In these Regulations the term "presiding judge" includes a recorder and a chairman of quarter sessions or their deputies.

Given under my hand at Whitehall, this 30th day of December, 1903.

A. AKERS DOUGLAS,
One of His Majesty's Principal
Secretaries of State.

ADDITIONAL RULES, 1904.

1. Every clerk of assize and clerk of the peace shall keep a list of solicitors who are willing to undertake the defence of poor prisoners, and shall insert in such list the names of all solicitors who are willing so to act. The name of any solicitor shall be removed from the list, either on application of the solicitor himself, or by direction of any judge of assize or chairman of quarter sessions. A copy of such list shall be sent to every clerk to justices in the county or quarter sessions district.

2. Every clerk of assize and clerk of the peace shall keep a list of the members of the Bar attending the circuit or sessions who are willing to act as counsel for poor prisoners, and shall insert in such list the names of all such members of the Bar who are willing so to act.

3. Any certificate given by the justices in pursuance of section 1 of the Poor Prisoners' Defence Act, 1903, shall be in Form A. in the Schedule hereto. It shall, as soon as it has been given, be sent by the clerk to the justices to the clerk of assize or clerk of the peace, together with the name of the solicitor assigned. The certificate given by a judge of assize or chairman of quarter sessions shall be in Form B. in the Schedule hereto.

4. Any justices, judge of assize, or chairman of quarter sessions who shall give such a certificate shall at the same time assign to the prisoner from the lists kept under Rule 1 a solicitor to whose services the prisoner shall be entitled.

A copy of the depositions shall be furnished to the solicitor so assigned by the justices' clerk, clerk of assize or clerk of the peace, as the case may be.

5. Any member of the Bar whose name appears upon the list kept under Rule 2 may be instructed on behalf of the prisoner by the solicitor so assigned.

SCHEDULE.

FORM A.—Certificate of Committing Justices.

We [*or I*] the committing justice[s] in the case of ———, having regard to the nature of the defence set up by him, as disclosed in the evidence given before us [*or me*] [*or in the statement made by him before us*] [*or in the evidence given and statement made by him before us*] are [*or am*] satisfied that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defence, and that his means are insufficient to obtain such aid, and we [*or I*] therefore certify that the said ——— ought to have such legal aid.

A. B. ———

C. D. ———

Justices of the Peace.

NOTE.—The prisoner has been committed to ——— Prison [*or has been released on bail and may be communicated with at* ———].

—————

FORM B.—Certificate of Judge or Chairman.

I, A. B., ———, having regard to the nature of the defence set up by ———, disclosed in the evidence given [*or in the statement made by him*] [*or in the evidence given and statement made by him*] before the committing justices, am satisfied that it is desirable in the interests of justice that he should have legal aid in the conduct of his defence, and that his means are insufficient to enable him to obtain such aid, and I therefore certify that the said ——— ought to have such legal aid.

A. B. ———,

Judge of Assize,

or

Chairman of Quarter Sessions,

or

Recorder of ———.

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